

**Bond University**

## **DOCTORAL THESIS**

### **Deception as a Legal Negotiation Strategy: a Cross-jurisdictional, Multidisciplinary Analysis Towards an Integrated Policy Reforms Agenda**

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**Deception as a Legal Negotiation Strategy:  
A Cross-Jurisdictional, Multidisciplinary Analysis  
Towards an Integrated Policy Reforms Agenda**

Presented by

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Submitted in Fulfilment of the Requirements of the Degree of

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## **DECLARATION**

Any studies in this thesis constitute work carried out by the candidate unless otherwise stated.

The thesis is less than 100,000 words in length, exclusive of footnotes, tables, figures, bibliography and appendices, and complies with the stipulations set out for the degree of Doctor of Philosophy by Bond University in Queensland, Australia.

## CERTIFICATION

To the best of my knowledge and belief, I hereby declare that this submission is my own original work, except as acknowledged and cited in the text. All sources used in the study have been cited, and no attempt has been made to project the contribution of other researchers as my own.

To the best of my knowledge and belief, it contains no material previously published or written by another person, except where due reference is made in the text of the thesis.

Avnita Lakhani

9 August 2010

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## PUBLICATIONS

### Publications Arising Out of This Thesis

- Avnita Lakhani, 'The Fog Has Not Lifted – Section 198J of the NSW Legal Profession Act in Light of Acceptable Negotiation Theory and Principles' (2006) 18.1 *Bond Law Review* 61; also published in *ADR Bulletin* as Parts 1 and 2 (2006).
- Avnita Lakhani, 'The Truth About Lying as a Negotiation Tactic: Where Business, Law, and Ethics Collide...or Do They?' (2007) Part 1/2, 9 *ADR Bulletin* 6; also accepted for publication in *Brief*, The Journal of the Law Society of Western Australia (2007).
- Avnita Lakhani, 'The Truth About Lying as a Negotiation Tactic' (Paper presented at LEADR's 9<sup>th</sup> International ADR Conference, Wellington, New Zealand, September 2007).
- Avnita Lakhani, 'Deception as a Negotiation Tactic: Fact or Fiction' (Paper presented at 'kon gress, LEADR's 10th International ADR Conference, Melbourne, Victoria, 9 September 2009).
- Avnita Lakhani, 'Deception as a Negotiation Tactic: A Study of the Views and Perceptions of Practitioners' *Update* (October 2009). *Update* is a monthly publication of LEADR.
- Avnita Lakhani, 'Deception as a Negotiation Tactic: A Study of the Views and Perceptions of Practitioners' (2010) 7(2) *Rutgers Conflict Resolution Law Journal* 1.

### Other Publications

Available on request

### Conference Presentations Related to This Thesis

- Presenter – Cairns Law Conference, Cairns, Queensland, Australia (July 2006).
- Presenter – National Mediation Conference, Hobart, Tasmania, Australia (May 2007).
- Presenter – LEADR's 9th International ADR Conference, Wellington, NZ (Sept 2007).
- Presenter – BURCS Seminar, Gold Coast, Queensland, Australia (May 2006 / Jan 2007).
- Presenter – 'kon gress, LEADR's 10th International ADR Conference, Melbourne VIC (Sept 2009).
- Presenter – International Legal Ethics Conference IV, Stanford, California (July 2010).

## **THESIS ABSTRACT**

This thesis is a cross-jurisdictional, multidisciplinary study of the use of potentially deceptive conduct in negotiation by lawyers and the regulation of such deceptive conduct through the legal ethics codes.

Negotiation is considered a vital skill for every legal practitioner. Negotiation is also a fairly unregulated dispute resolution process yet ubiquitous in practice. One of the alleged acceptable tactics in negotiation is the use of some deception in certain forms. Potentially deceptive tactics such as bluffing, puffing, exaggerating the value of a deal, and certain settlement offers are considered a natural and acceptable part of the bargaining dance under acceptable negotiation theory. This is especially true in business.

Legal negotiators, however, work under very strict ethical codes of conduct which prohibit deception, misrepresentation, lying and fraud in any capacity. A lawyer is not supposed to lie – ever. This is due to the legal professional's multi-faceted duties of loyalty to the client, the court, the justice system, and the public interest. However, over the last few decades, legal professionals have incurred a negative perception of being liars and manipulators who themselves run afoul of the law and do not serve their clients' best interests.

While legal ethics codes are meant to curtail the deceptive behaviours of legal professionals, it is not entirely clear whether such attempts are successful or ever can be successful in light of acceptable negotiation practices which include some forms of deception.

This thesis focuses on four main research questions related to deception in legal negotiation. First, the thesis addresses whether lawyers engage in deception in negotiation. Second, the thesis discusses whether legal ethics codes address this issue by conducting a comparative study of the legal ethics codes of four common-law jurisdictions. Third, the thesis presents an original analysis of the legal ethics violations cases of one common-law jurisdiction. Finally, the thesis recommends a tripartite set of strategic, integrated policy reform proposals aimed at addressing the issues related to lawyer deception in negotiation.

Analysing the issue in a multidisciplinary capacity is essential to a better understanding of the role of ethics in the legal profession and the effect of regulating certain practices in negotiation. Through this understanding, the various stakeholders in the legal system are better able to assess the extent to which the legal profession can successfully support lawyers in their duties to their clients, the courts, and the public interest whilst also maintaining a successful, ethically-focused practice.

# CHAPTER 1 – INTRODUCTION AND RATIONALE

*‘We are what we repeatedly do. Excellence, then, is not an act, but a habit.’*

~ Aristotle<sup>1</sup>

This chapter provides an introduction and rationale for undertaking this research project and the investigation into a specific set of research questions. A background to the study is followed by a discussion of the significance of this study as well as the study’s contribution to knowledge. The chapter concludes with an overview of the research methodology, a statement of the problem, research questions, hypotheses (where applicable), and organisation of the thesis.

## 1.1 INTRODUCTION

Negotiation is long considered *an* essential skill of a legal professional,<sup>2</sup> if not *the* essential skill of an effective legal professional.<sup>3</sup> While negotiation, or bargaining

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<sup>1</sup> Thinkexist.com, *Aristotle quotes* (2009) <<http://thinkexist.com/quotes/aristotle/2.html>> at 9 August 2010.

<sup>2</sup> John Carvan, *Understanding the Australian Legal System* 74 (5<sup>th</sup> ed, 2005). (‘The term *lawyer* collectively describes members of the legal profession – barristers and solicitors.’). Similarly, the term *legal professional* as used in thesis refers to barristers and solicitors. The terms *lawyer*, *attorney*, and *legal professional* are used interchangeably to mean a qualified member of the bar of the legal profession in a particular jurisdiction. See also Rex R Perschbacher, ‘Regulating Lawyers’ Negotiations’ (1985) 27 *Arizona Law Review* 75, 75-76, n2 (‘Negotiation is one of the most important activities of the practicing lawyer. It is the dominant method of resolving civil and criminal disputes and is also important in a non-litigation or transaction context such as in setting contract terms.’); Carrie Menkel-Meadow, ‘Legal Negotiation: A Study of Strategies in Search of a Theory’ (1983) 4 *American Bar Foundation Research Journal* 905, 911 (‘...legal negotiators put together the millions of daily transactions that keep social, economic, and legal structures functioning...’)

<sup>3</sup> William M Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond, and Lee S Schulman, *Educating Lawyers: Preparation for the Profession of Law* (2007) 111 (stating that in the late 1970s, the American Bar Association specifically required the teaching of negotiation in law schools after a report on lawyer competency). See also American Law Institute - American Bar Association, *Enhancing the Competence of Lawyers: The Report of the Houston Conference XI-XII* (1981); Mark Osler, *The Role of Negotiation in Criminal Law Teaching* (2006)

as it is often called, is something most people engage in on a daily basis, there is now particular attention being paid to how legal professionals negotiate because of the special rules and constraints to which lawyers are subject. One of these factors is the extent to which legal ethics codes impact a lawyer's use of potentially deceptive tactics in negotiations. In addition, these constraints vary across legal jurisdictions and even countries. While research in the area of legal negotiation behaviour is limited, research into the bargaining ethics of legal professionals is even more scant. This thesis contributes knowledge to this important and emerging area of interest amongst practitioners, academia, lawmakers and society at large.<sup>4</sup>

## **1.2 BACKGROUND TO THE STUDY**

This thesis is about the study of the relationship between lawyers, the practice of negotiation in the context of the legal system, the ethics by which lawyers must perform their duties within the legal system and within society and the extent to which lawyers are permitted to use, or use regardless of permission, certain acceptable negotiation strategies, namely deception. Prior to discussing the background to the study, it is recognised that many lawyers may not practice in a strictly adversarial legal setting where the issues of deception in negotiation are likely more relevant. For example, many lawyers are engaged in non-litigious and non- adversarial work such as preparation of documents, where adversarial negotiation tactics such as deception might not exist.

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<[http://lsi.typepad.com/lsi/2006/12/the\\_role\\_of\\_neg.html](http://lsi.typepad.com/lsi/2006/12/the_role_of_neg.html)> at 9 August 2010 ('Over 90% of criminal cases plead out in most jurisdictions, so negotiation is a key skill for criminal practitioners.').

<sup>4</sup> Robert J Condlin, 'Socrates' New Clothes: Substituting Persuasion for Learning in Clinical Practice Instruction' (1981) 40 *Maryland Law Review* 223 (discussing 'the major unstudied variable in the justice of the legal system – the patterned behaviour of individual lawyers.').

In understanding the importance of the study and its contribution to knowledge, attention to and recognition of several concepts is necessary.

First, negotiation,<sup>5</sup> by and large, may be construed as a social good in that the act of bargaining is part of the fabric of society. Society has always used negotiation as the primary means of social currency to achieve personal or business objectives.<sup>6</sup> It is ubiquitous. Many consider negotiation to be a social process, the regulation of which could be detrimental to social functioning.<sup>7</sup> Negotiation, as a dispute resolution process, has undergone an evolution from being a fairly unstructured and loose interaction to being a more sophisticated, structurally defined process with its own rules, both technical and ethical and, in some cases, varied by profession.<sup>8</sup> While the classical distributive bargaining<sup>9</sup> technique is still used in such areas as personal injury cases and contract negotiations, an integrative bargaining model, sometimes

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<sup>5</sup> Please refer to Section 1.7 (Definition of Key Terms) for a definition of 'negotiation' as used in this thesis.

<sup>6</sup> See, eg, Richard T Ritenbaugh, *Negotiations, Deceptive* (2009)

<<http://bibletools.org/index.cfm/fuseaction/Topical.show/RTD/CGG/ID/3716/Negotiations-Deceptive.htm>> at 9 August 2010 (discussing Biblical verses Numbers 22:7-14 which entails the biblical story of a labour negotiation between Balaam, Balak, and the princes as well as the deceptions used to obtain personal or material gain). The reason for the alleged deception is the desire to have the best of both worlds. That core reason does not appear to have changed though, I argue, the means of achieving such desires is important. See also Robert Benjamin, *Swindlers, Dealmakers, and Mediators: A Brief History of Ethics in Negotiation* (2004)

<<http://www.mediate.com/articles/benjamin16.cfm#>> at 9 August 2010 ('There have been third parties involved in brokering business deals, treaties, and conflicts since the beginning of time but only in recent years have we begun to formalize and professionalize that role.')

<sup>7</sup> James A Barnes, *A Pack of Lies: Towards a Sociology of Lying* (1996) 3 (discussing Arendt (1968) and Barwise and Perry (1983) and the views of lying as central to human creativity, conversation, and freedom). See also Avnita Lakhani, 'The Truth About Lying as a Negotiation Tactic: Where Business, Law, and Ethics Collide...or Do They?' (2007) 9 *ADR Bulletin* 6.

<sup>8</sup> By this I mean that the rules for acceptable bargaining in business may be different than rules for bargaining in the legal system. See, eg, Benjamin, above n 6 (describing negotiation as 'the heart of mediation' and providing historical examples of negotiations and the tensions created by its historical past through Biblical times).

<sup>9</sup> Please refer to Section 1.7 (Definition of Key Terms) for a definition of key terms used in this thesis.

called principled negotiation,<sup>10</sup> has gained in popularity through the publication of negotiation books such as *Getting to Yes*<sup>11</sup> and *Getting Past No*.<sup>12</sup>

Second, lawyers negotiate constantly and on a daily basis; however, many lawyers negotiate within a very specific context, namely the adversarial legal system which appears to support litigation as the core means of dispute resolution. By this I mean that the adversarial system, historically, is based on the notion of every person having their day in court where the rules of litigation apply as opposed to rules of mediation, negotiation, or other dispute resolution process. ‘Adversarial’ means and implies adversaries or competitors who are automatically on opposite sides with opposing views. It is about winners and losers, about claiming as much value out of the bargaining pie as one can for the benefit of one’s client. It is about client loyalty above all else. As such, an adversarial system might naturally embrace a distributive bargaining model. Once again, it is acknowledged that some lawyers may engage in transactional or non court-related legal work that does not consist of adversarial bargaining. In such cases, these lawyers may adopt other negotiation styles. However, nearly all lawyers generally have special ‘rules’ and ‘ethical codes’ that appear to prevent them from using certain distributive bargaining strategies, such as an acceptable level of deception, that are naturally acceptable to all other non-legal negotiators/bargainers.

Finally, ethics and the extent to which negotiations should be ethical is becoming an ever-increasing area of critical analysis and concern. With the evolution

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<sup>10</sup> Principled negotiation is the term used by Fisher and Ury to describe interest-based negotiations. It consists of four main principles: 1) separate people from the problem; 2) focus on interests, not positions; 3) invent options for mutual gain; and 4) insist on objective criteria.

<sup>11</sup> Roger Fisher and William Ury, *Getting to Yes: Negotiating Agreement Without Giving In* (1981).

<sup>12</sup> William Ury, *Getting Past No: Negotiating Your Way from Confrontation to Cooperation* (1993).



of business and law in an era of globalisation, both law and business are instantly international services and subject to the cross-cultural, cross-disciplinary, and cross-jurisdictional forces that collide with ethics. These ethics include societal ethics (the ethical norms of a society, community, or culture under which lawyers operate), bargaining or negotiation ethics (the personal ethics paradigm of negotiators) and legal ethics (the ethics codes imposed on lawyers). Ethics is often concerned with expectations of truth and fairness so that the use of deception or deceptive negotiation tactics, such as lying, would seem to violate the rules of ethical negotiation. Further, a legal negotiator who uses deception could be considered unethical and in violation of the legal ethics code. Yet when looking at acceptable negotiation theory and principles, certain deceptive practices are considered permissible and expected.

The study aims to look at certain deceptive practices used by legal professionals, how and why ethics codes attempt to regulate such conduct, and whether the ethical controls imposed on the use of certain allegedly deceptive negotiation tactics by legal professionals may or may not be successful.

### **1.3 SIGNIFICANCE OF THE STUDY**

This study is significant in four important ways. First, the seemingly troubling and increasing negative perception of legal professionals by clients, legal commissions, disciplinary tribunals and courts, is frequently attributed to lawyers being perceived as deceptive and unethical.<sup>13</sup> While the overall number of lawyers

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<sup>13</sup> See, eg, Gary A Hengstler, 'Vox Populi: The Public Perception of Lawyers: ABA Poll' (1993) 79 *American Bar Association Journal* 60; American Bar Association Section of Litigation, *Public Perception of Lawyers: Consumer Research Findings* (2002) <<http://www.abanet.org/litigation/lawyers/publicperceptions.pdf>> at 9 August 2010; Daniel Dasey, *Judges lose public's confidence* (4 May 2003) *The Sun Herald* <<http://www.smh.com.au/articles/2003/05/03/1051876898909.html>> at 9 August 2010; Margaret Simons, *Lawyers Not Moral Judges: Clayton Utz Chief*, *The Sunday Age* (Melbourne), 4 August 2002,

may be 'honest', the negative perception created by a few lawyers in a self-regulated profession may be enough to engender concern and a review of legal ethics codes.

Second, law increasingly plays a role on the international stage yet the jurisdictional standards of proper ethics with respect to negotiation are inconsistent. One country's legal ethics codes may condone certain levels of acceptable deception while another country's ethics patently forbid any form of deceit or misrepresentation during negotiations. At the same time, a lawyer's clients may play by their own, perhaps contradictory, ethics with respect to bargaining. Understanding such tensions is critical in order for lawyers to navigate the bargaining minefield.

Third, understanding the tensions between law, ethics, and negotiation will benefit policy makers so as to ensure that future policy affecting legal professionals and their duties to the client, the courts, and the pursuit of justice takes into account the impact of rules and ethical codes which constrain a lawyer's ability to serve the public interest. Furthermore, policy decisions which attempt to control certain behaviours of legal professionals can account for reasonable societal expectations of the duties carried out by legal professionals.

Finally, this study is significant in reviewing the existing theoretical framework for negotiation and introducing a potentially new theoretical framework for the negotiation process. By doing so, this study fills a gap in the existing knowledge with respect to fully understanding the implications of imposing ethical controls on the negotiation behaviour of legal professionals.

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3. Full article is available at <<http://www.theage.com.au/articles/2002/08/03/1028157860572.html>> at 9 August 2010.

## **1.4 CONTRIBUTION TO KNOWLEDGE**

This thesis provides considerable contribution to knowledge in various areas including the cross-disciplinary areas of negotiation theory, legal ethics, negotiation ethics, and negotiation practice and legal education. The most significant contribution, as discussed below, is to the area of public policy and law reform.

First, as discussed further in Chapter 7, this thesis presents a comprehensive, integrated set of policy reform proposals aimed at addressing the complex issues represented by the research questions outlined in Chapter 1, section 1.6. These policy reform proposals target legal regulation, ethical standard setting, and institutional design, three components of sustainable, measurable change.

A second contribution of this thesis to public policy and law reform is a more thorough and comprehensive knowledge base from which to inform policy making decisions that might affect legal professionals, especially in the area of negotiations and legal ethics. This knowledge base is primarily in the form of the literature review which takes an interdisciplinary approach to investigating and analysing current research on negotiation, ethics, legal decision-making and notions of how legal professionals conduct their negotiation practices.

A third significant contribution of this thesis to public policy and law reform is an integrated framework for analysing and addressing a research problem which, even today, is a source of debate without action or resolution. While most scholarly attempts to address the issue of deception in legal negotiation have included isolated suggestions and proposed solutions, this thesis strives to take a more multidisciplinary, cross-jurisdictional view of the issues and proposes an integrated framework for addressing the research question. This integrated framework can be

replicated across jurisdictions and implemented with minimal effort and maximum benefits.

Finally, this thesis addresses the challenges of implementing proposed behavioural changes by introducing and discussing some viable methods of executing the policy reform proposals that will allow policy makers and other key stakeholders to benchmark, test, and measure the successful development of policy in the target areas.

## **1.5 OVERVIEW OF RESEARCH METHODOLOGY**

The purpose of this section is to provide an overview of the research methodology used in this thesis. The research methodology used in this study is broad, varied, multidisciplinary, and cross-jurisdictional. This methodology is used to ensure reliability and validity of the results with respect to the research questions.

A particular study may have a specific *research perspective*.<sup>14</sup> In the context of this study, the research perspective is limited to a positivist inquiry approach in the areas of law, legal negotiation, and legal ethics from the perspective of common-law jurisdictions. A positivist inquiry, most commonly used and respected within legal academia, means that the research entails a review and analysis of law and related legal document such as statutes, codes of conduct, tribunal decisions, judicial opinions, law journal articles, law review articles, and case law decision in law and ethics. Further, a review of literature in related areas such as negotiation, psychology, behavioural modification, business, and economics is undertaken, where necessary and applicable.

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<sup>14</sup> See generally Raymond L Calabrese, *The Elements of an Effective Dissertation & Thesis: A Step-by-Step Guide to Getting it Right the First Time* (2006).

The *research design* of this thesis is primarily a theoretically based, qualitative study, one which is common to the field of law. A key aspect of this design is to not only describe but to analyse certain key variables of the research question in attempting to explain the cause of a phenomenon.<sup>15</sup> For example, if the use of deceptive negotiation practices is prohibited in the legal profession then why are there so few cases of ethical violations by legal professionals who use such practices, almost daily?

The central aspects of the research design consisted of the following main tasks: 1) a catalogue and analysis of various tactics used by legal professionals when employing a strategy of deception in negotiation; 2) an analysis of legal ethics codes in various common-law countries, primarily Australia and United States with some analysis of Canadian and Hong Kong legal ethics codes; 3) an analysis of legal ethics cases decided in Queensland, Australia; 4) a set of strategic policy reform proposals designed to address the issues raised by the study; and 5) an analysis of methods used to successfully implement policy changes as related to the policy reform proposals recommended herein.

*Data collection* involved the process of defining and collecting information from which to conduct detailed analysis, present the findings, and interpret the implication of the research findings on future policy reform. Overall, I performed the following data collection and data analysis tasks:

- review and analyse existing literature to find what types of tactics and behaviours legal professionals might associate with a strategy of deception in negotiation;

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<sup>15</sup> See, eg, John W Cresswell, *Research Design: qualitative and quantitative approaches* (1994); Bruce W Tuckman, *Conducting Educational Research* (3<sup>rd</sup> ed, 1988).

- review and analyse literature to understand the difference between various models of ethics, especially legal ethics versus philosophical ethics versus bargaining ethics, if any;
- review and analyse legal ethics codes to understand the kinds of deceptive behaviours the legal ethics codes is attempt to regulate or control in various jurisdictions;
- review and analyse negotiation literature to determine to what extent deceptive behaviour is allowed or not allowed and the impact of bargaining ethics on such; and
- review and analyse measures of ‘success’ of negotiation such as efficiency, agreement, and good outcome in order to determine if regulating deceptive behaviours via the legal ethics code could be considered ‘successful’ both in terms of successful negotiation and as determined against negotiation theory and principles.

## **1.6 RESEARCH PROBLEM**

This section discusses the research problem that is the focus of this thesis including a statement of the problem, research questions, limitations and delimitations.

### **1.6.1 Statement of the Problem**

In the context of a thesis, Clark, Guba, and Smith state that a problem ‘establishes the existence of two or more juxtaposed factors, which, by their interaction, produce: (1) an enigmatic or perplexing issue, (2) yield an undesirable

consequence, or (3) results in a conflict which renders the choice from among available alternatives moot.’<sup>16</sup>

Prevailing negotiation literature contends that certain kinds of deception are permissible, and even expected, as part of the bargaining process, while other deceptive tactics are considered unethical or sometimes illegal.<sup>17</sup> Juxtaposed to that, the legal ethics codes for certain countries, though not all, allow for a certain amount of deception when lawyers negotiate on behalf of their clients. Sometimes the bounds of the legal ethics codes conflict with societal norms of what is expected of lawyers and the standard of behaviour expected in the negotiation process. In addition, over the last decade or so, there has been a significant decline in the public’s trust and perception of the justice system with the primary issue being the lack of integrity and honesty of lawyers.<sup>18</sup> Finally, there have been recent attempts to not only impose greater candour within the bargaining process but to call for amendments to legal ethics codes to fully restrict a lawyer’s attempts to use deceptive tactics in any context.<sup>19</sup> So far, there has not been an adequate assessment of this problem to propose a viable, practical solution. Therefore, a more thorough analysis of prevailing ideas and knowledge using a multidisciplinary approach is necessary.

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<sup>16</sup> David L Clark, Egon G Guba, Gerald R Smith, *Functions and Definitions of Functions of a Research Proposal* (1977) 6. <<http://polaris.gseis.ucla.edu/jrichardson/dis290/clark.pdf>> at 9 August 2010. See also Fred N Kerlinger, *Foundations of Behavioral Research* (1973) 16-17 (‘A problem, then, is an interrogative sentence or statement that asks: What relation exists between two or more variables?’).

<sup>17</sup> See Chapter 2 (Review of Literature) for more information on this topic. By ‘illegal’ I am referring to certain deceptive behaviour that may be considered fraudulent and is therefore generally considered to be illegal as well as in violation of professional ethics codes.

<sup>18</sup> See, eg, Hengstler, above n 13; American Bar Association Section of Litigation, *Public Perception of Lawyers: Consumer Research Findings*, above n 13; Dasey, above n 13; Simons, above n 13.

<sup>19</sup> See, eg, Eleanor Holmes Norton, ‘Bargaining and the Ethics of Process’ in Carrie Menkel-Meadow and Michael Wheeler (eds) *What’s Fair: Ethics for Negotiators* (2004) 270-298; John Ladd, ‘The Quest for a Code of Professional Ethics: An Intellectual and Moral Confusion’ in Geoffrey C Hazard Jr and Deborah L Rhode, *The Legal Profession: Responsibility and Regulation* (2<sup>nd</sup> ed 1988) 105; Carrie Menkel-Meadow, ‘Lying to Clients for Economic Gain or Paternalistic Judgment: A Proposal for a Golden Rule of Candour’ (1990) *University of Pennsylvania Law Review* 761

### **1.6.2 Research Questions**

As discussed before, negotiation, a critical function of lawyers, intersects both law and ethics and provides fertile ground for research. The ways in which lawyers conduct negotiations or behave as negotiators may have an impact on how clients or key stakeholders perceive the legal profession's ability to administer justice.

With an understanding of this context, the focus of this study is an attempt to answer the following research questions:

- (a) What are some potentially deceptive negotiation tactics as commonly used by lawyers as negotiators?
- (b) How do legal ethics rules attempt to control the potentially deceptive negotiation tactics as might be used by legal professionals?
- (c) Are attempts by legal ethics rules to regulate the use of potentially deceptive negotiation tactics by legal professionals successful?
- (d) How can the prevailing approach be reformed to improve the ways in which the profession might more successfully regulate the use and impact of potentially deceptive negotiation tactics by legal professionals?

Prior to discussing the research hypotheses, this study acknowledges that there may be other specific jurisdictional statutory controls on negotiation behaviour which are considered out of scope for the purposes of this thesis and this study. Some of these include, for example, the requirement of 'good faith' in negotiation in such areas as retail lease disputes and franchising disputes, the evolution of the negotiation pledge in Victoria, Australia, and the use of collaborative negotiation models which contractually require candour and transparency. While such legislation is important to



the evolution of attempts to control negotiation behaviour, the focus of this study is on the legal ethics codes to which every practicing lawyer is subject within their practicing jurisdiction.

### **1.6.3 Research Hypotheses (where applicable)**

As the research design of this study is a qualitative research methodology, detailed research hypotheses are not applicable.

However, given that one aspect of this study consists of a detailed analysis of a common-law jurisdiction's ethics cases, research hypotheses in this context may be useful. The following are research hypotheses relate specifically to the qualitative study of ethics violation cases<sup>20</sup> in Queensland, Australia:

1. Where deception is used by a lawyer in a negotiation context, the lawyer will be punished for unethical conduct, cited either as unprofessional conduct or practice or professional misconduct, in violation of professional ethics codes.
2. Lawyers who practice in a jurisdiction where certain deceptive practices in negotiation *are allowed* will not be punished under the professional code of ethics for engaging in such conduct.
3. Lawyers who practice in a jurisdiction where deception in negotiation is *not allowed* will be punished for the use of deception in negotiation under the professional code of ethics.
4. Deception in negotiation is deemed not acceptable unless specifically indicated or outlined in a jurisdiction's professional code of ethics.

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<sup>20</sup> See Chapter 5, Section 5.10 (Queensland Ethics Violation Cases) for more information on this topic.

It is expected that a post-doctoral study would include and benefit from a quantitative study using measurable hypotheses with a target audience of legal professionals.

#### **1.6.4 Limitations**

Limitations are potential weaknesses in the design or methodology of the study that potentially restricts the study's scope.<sup>21</sup>

There are three possible limitations of this study design. First, the geographic scope is limited to select common-law countries, namely Australia, United States, Hong Kong, and Canada. In addition, there may appear to be a greater reliance on US sources on the primary topic relative to sources from other common-law countries. This may be because of the breadth of literature and perspectives available in the US regarding the topic of legal ethics rules to control negotiation behaviour as well as debate surrounding some of the controversial provisions of the American Bar Association's *Model Rules of Professional Conduct*. This is meant to provide a perspective and basis for discussing the topics herein and not intended to convey that these perspectives or issues necessarily exist in other common-law countries studied in this thesis. However, the issue of whether legal ethics codes are effective in controlling lawyer behaviour, especially in negotiation, is ripe for all common-law countries because these professional ethics codes serve as the basis for the self-regulation of the profession in common-law countries. In addition, the duties, task, and obligations of lawyers in common-law countries are similar to the extent that recommendations based on an understanding of one common-law country's legal ethics rules, such as those of the United States or Canada, for example, might be

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<sup>21</sup> Enrique J Murillo, Jr, *Murillo method: A guide* (2005) <<http://coe.csusb.edu/Murillo/method3.htm>> at 9 August 2010; Calabrese, above n 14, 12.

useful for other common law such as Australia and Hong Kong. In the end, the perceived reliance on sources from one country serves to only to educate and benefit others rather than to indicate or imply the dominance of one country's views on the topic over another.

Second, the absence of comparing a civil law country to the common law jurisdictions in this thesis or to a system that is culturally unique means that the results and recommendations may vary where such distinctions exist. On the other hand, this limitation is appropriate because civil law and common law systems are different. This potential limitation does not restrict the value of the findings of this study since Australia, United States, and a particular province in Canada have taken different approaches with respect to the use of ethical codes of conduct to control deceptive negotiation practices by legal professionals. Therefore, there is great benefit in a comparative study and such analysis will further provide a foundation for future studies across more legally and culturally diverse systems and jurisdictions.

Third, the regulatory scope of the study is limited to looking at ethical codes of conduct for legal professionals as well as cases dealing with the violation of professional ethics codes. Professional ethics codes are the primary source of guidance for how lawyers *ought* to behave in practice. These professional ethics codes provide the legal profession's regulatory controls for lawyers such that lawyers who violate these ethics rules are subject to professional sanctions.

A final potential limitation of this study is the analysis of the ethics violation cases of a single common-law jurisdiction, Queensland, as opposed to conducting an analysis across legal jurisdictions. The purpose of using a single common-law jurisdiction is two-fold. First, the ethics violation cases in Queensland are readily

available through a public register. Second, analysing the ethics violation cases of a single jurisdiction helps to establish the framework and guidelines for conducting future post-doctoral studies. Therefore, this potential limitation does not deter from the value of this thesis in contributing to knowledge of the research problem, research questions, subsequent findings and policy reform proposals.

### **1.6.5 Delimitations**

Delimitations are the self-imposed boundaries used to delimit the scope of the study.<sup>22</sup>

The focus and scope of the study is based on an evolving delimitation process. After a preliminary review of many statutes, regulations, codes, and cases which attempt to control the negotiation practices of legal professionals, it became clear that the most direct and explicit source of regulating lawyer conduct in practice on a national basis is the legal ethics codes. In addition, the legal ethics codes define and regulate how lawyers ought to behave in their various functions, such as advocates, mediators, and judges. This is not to say that there are no other statutory attempts to control negotiation behaviour. As stated above, it is acknowledged that there may be other specific jurisdictional statutory controls on negotiation behaviour, such as good faith requirements, negotiation pledges, or contractually binding collaborative lawyering agreements that mandate honesty. However, the legal ethics codes bind every practicing lawyer in their profession, and sometimes personal, capacity. Therefore, I concluded that a more focused study involving key variables would achieve the objectives of this thesis in terms of answering a set of specific research questions and making a viable contribution to knowledge.

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<sup>22</sup> University of South Dakota, *12 Components: Evaluating qualitative design* (2005) <<http://www.usd.edu/ahed/analysis.cfm>> at 9 August 2010; Calabrese, above n 14, 13.

The literature review, analysis, and published articles related to this thesis revealed that one of the more persistent issues in the field is the seemingly perpetual, yet scientifically unproven, notion that lawyers are deceptive and that deceptive practices by lawyers in negotiations are the norm. A related issue involves conflicting views on whether to condone the use of deceptive tactics by lawyers engaged in negotiation, with some contending that there should be a rule or code of conduct that imposes greater candour or truth in negotiations. This position appears to be contrary to acceptable negotiation principles, theories, and practice. The negotiation process and the ethics of legal professionals are under greater scrutiny with the increased use of legal negotiation. Therefore, defining the scope of this study to the intersection of law, ethics and negotiation, specifically as it pertains to attempts by the legal ethics codes to regulate the use of deceptive tactics by legal professionals, provides a significant contribution to knowledge.

Furthermore, because the common-law jurisdictions of Australia, United States, and Canada appear to have taken different approaches in their professional ethics codes in terms of regulating deceptive conduct of legal professionals, a comparative analysis is insightful and provides the basis for further empirical studies. While the study attempts to conduct a cross-jurisdictional and multidisciplinary analysis, it does not attempt to discuss in detail the cross-cultural implications or multicultural aspects of the research questions though some attention is warranted where it may provide insight or explanation. A full and thorough analysis of the specialised topic of cross-cultural negotiations is not within the scope of this study, though insights gained in this study may be applied cross-culturally.

### 1.6.6 Assumptions

Kennedy states that '[i]n research, assumptions are equivalent to axioms in geometry – self-evident truths, the *sine qua non* of research. In research, well-constructed assumptions add to the study's legitimacy.'<sup>23</sup> Assumptions may take the form of propositions to guide the inquiry in the form, for example, 'if we assume x, then it follows that y.'<sup>24</sup> The following assumptions were made during this study:

1. Where the prevailing societal ethics was in line with the legal ethics of the jurisdiction and did not condone the use of deception in negotiation, there should be less tolerance for the use of deceptive tactics among legal professionals.
2. Legal professional ethics codes regulate the deceptive practices of legal professionals and punish accordingly.
3. Deception and the use of deceptive practices are generally considered common practice in some legal negotiations.
4. The profession of lawyers (the professional body) recognise that negotiation is a specific skill used by lawyers.
5. Regulatory bodies do not condone the use of deception in negotiation unless specifically indicated, the presumption being that the use of deception by all lawyers, in any capacity, is *not* acceptable.
6. If we assume that the legal ethics codes bar the use of deceptive behaviour among legal negotiators, then it follows that violation of these codes should result in significant numbers of ethics violation

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<sup>23</sup> Calabrese, above n 14, 14.

<sup>24</sup> Robert Yin, *Case study research: Design and methods* (3<sup>rd</sup> ed, 2003); Calabrese, above n 14, 14.

cases against lawyers in a self-regulated profession with severe consequences.

7. If we assume that the legal ethics codes do not bar the use of deceptive behaviour among legal negotiators, then it follows that violation of these codes should not result in significant numbers of ethics violation cases against lawyers in a self-regulated profession with severe consequences.
8. Where the law imposes controls on negotiation behaviour in contravention of acceptable negotiation theory and principles, such controls would undermine the goal of ‘successful’ negotiations.

## **1.7 DEFINITION OF KEY TERMS**

This section lists and defines the key terms that are central to this study and used throughout this thesis. Unless otherwise indicated in the body of the thesis, the terms listed in this section will have the corresponding meaning. The key terms used in this thesis are as follows, in alphabetical order:

1. *Bargaining* – defined as ‘the competitive, win-lose situations such as haggling over price that happens at a yard sale, flea market, or used car lot.’<sup>25</sup>
2. *Cross-jurisdiction* – defined as taking into account the views of different geographic boundaries with the authority to exercise power or administer justice.<sup>26</sup> For example, in this thesis, the legal jurisdictions taken into account are Australia, United States, Canada, and Hong Kong.

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<sup>25</sup> Roy Lewicki, David M Sanders, and Bruce Barry, *Negotiation* (5<sup>th</sup> ed, 2006) 3.

<sup>26</sup> Sara Hawker (ed), *Colour Oxford Dictionary, Thesaurus, and Wordpower Guide* (2002) 340.

3. *Deception* – defined as ‘the business of persuasion aided by the art of selective display’ put into effect by two primary behaviours: ‘hiding the real and showing the false.’<sup>27</sup> It involves convincing another to believe something which is either not true or not completely true.
4. *Ethics* – includes ‘the various theories and schools of ethics that attempt to describe the kind of moral action, conduct, motive or character that a society ought to embody, how society ought to behave.’<sup>28</sup> Negotiation scholars define ethics as ‘broadly applied social standards for what is right or wrong in a particular situation, or a process for setting those standards.’<sup>29</sup>
5. *Lawyer* – defined as a person admitted to the legal profession under the appropriate laws of a legal jurisdiction.<sup>30</sup> In the context of this thesis, the term *lawyer* encompasses both barristers (specialist advocates) and solicitors.
6. *Legal Ethics* – may be defined as ‘[u]sages and customs among members of the legal profession, involving their moral and professional duties towards one another, towards clients, and toward the courts.’<sup>31</sup>

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<sup>27</sup> John W Cooley, ‘Defining the Ethical Limits of Deception in Mediation’ (2004) 4 *Pepperdine Dispute Resolution Law Journal* 263; See also David Nyberg, *The Varnished Truth: Truth Telling and Deceiving in Ordinary Life* (1992) 66-67.

<sup>28</sup> *Black’s Law Dictionary* (6<sup>th</sup> ed, 1990) 553; See also Lewicki et al, above n 25, 236; See also David A J Richards, ‘Moral Theory, the Developmental Psychology of Ethical Autonomy and Professionalism’ (1981-1982) 31 *Journal of Legal Education* 359, 373 (describing ethics as a form of critical reasoning used to develop universalist principles that apply to oneself and others); Gary Tobias Lowenthal, ‘The Bar’s Failure to Require Truthful Bargaining by Lawyers’ (1988-1989) 2 *Georgetown Journal of Legal Ethics* 411, 413 (describing ethics broadly as desired conduct that is morally binding).

<sup>29</sup> Lewicki et al, above n 25, 236.

<sup>30</sup> See, eg, *Legal Profession Act 2004* (Qld) s 5 (describing various definitions of ‘lawyer’ under the Act); Hawker, above n 26, 352.

<sup>31</sup> *Black’s Law Dictionary*, above n 28, 894. See also Mirko Bagaric and Penny Dimopoulos, ‘Legal Ethics is (Just) Normal Ethics: Towards a Coherent System of Legal Ethics’ (2003) *QUT Law and*



Legal ethics are the standards of what is right and wrong by legal professionals who operate within the legal system. These standards are generally documented and prescribed in each jurisdiction's legal ethics rules and/or codes of professional conduct. In addition, these standards may be implicit by conduct as well as explicit by prescription.

7. *Legal Negotiation* – defined as situations that occur when parties try to find a solution to a complex problem within the rules, codes of conducts, and limitations of the legal justice system. Generally legal negotiation involves lawyers representing client interests, which are generally opposing interests.<sup>32</sup> In the context of this thesis, legal negotiation includes both distributive (common) and integrative situations.
8. *Legal Practitioner* – defined as a lawyer who holds a current practicing certificate or license in the relevant jurisdiction. In the context of this thesis, the term *legal practitioner* includes both barristers (specialist advocates) and solicitors. In addition, the terms *legal practitioner* and *lawyer* are used interchangeably in this thesis.
9. *Legal Regulation* – defined as the rules of law that are intended to control behaviour and are considered part of the state's 'normative arsenal' in regulating the conduct of members of society, re-enforcing ethical standards for the good and providing disincentives for poor

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*Justice Journal* 21; Gerald Wetlaufer, 'The Ethics of Lying in Negotiations' (1990) 75 *Iowa Law Review* 1219, 1235-1236.

<sup>32</sup> Russel Korobkin, 'A Positive Theory of Legal Negotiation' (2000) 88 *Georgetown Law Journal* 1789, 1809, n 24 (describing 'legal negotiation' as one 'where the negotiator often is an agent [lawyer] for a principal [client] who is not present at the bargaining table').

conduct. In the context of the legal profession, legal regulation includes professional codes of conduct (ethics codes), court rules, and laws regulating the legal profession such as the *Legal Profession Act 1987* in Australia.

10. *Lie* – defined as a false statement made with the intent to deceive, an intentional untruth.<sup>33</sup> In the context of the legal system, a lie may be defined as ‘a statement made with the intent to deceive which purports to state the existence, in unequivocal terms, of facts and law contrary to the declarant’s express knowledge.’<sup>34</sup>
11. *Morals (Morality)* – defined as ‘individual and personal beliefs about what is right and wrong.’<sup>35</sup> Morals are ‘cognizable and enforceable only by the conscience or by the... [moral sense] of right conduct, as distinguished from positive law.’<sup>36</sup>
12. *Multidisciplinary (Interdisciplinary)* – defined as taking an approach of problem solving by drawing from multiple branches of learning (disciplines) for the purposes of defining, analysing, and proposing solutions. For example, in this thesis the disciplines of law, ethics, business, psychology, and economics are used to define, understand, analyse, and propose solutions around the research questions.

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<sup>33</sup> *The Random House Dictionary of English Language* (2<sup>nd</sup> ed, 1987) 1109; *The Oxford English Dictionary* (2<sup>nd</sup> ed, 1989) 899; Cf Wetlaufer, above n 31, 1223 (defining lying to include ‘all means by which one might attempt to create in some audience a belief at variance with one’s own.’); Sisela Bok, *Lying: Moral Choices in Public and Private Life* (1978) 14 (defining a lie as ‘any intentionally deceptive message which is stated.’).

<sup>34</sup> Thomas F Guernsey, ‘Truthfulness in Negotiation’ (1982-1983) 17 *University of Richmond Law Review* 99, 105.

<sup>35</sup> Lewicki et al, above n 25, 236.

<sup>36</sup> *Black’s Law Dictionary*, above n 28, 1008 (‘Moral’, part 2).

13. *Negotiation* – defined as both integrative (non zero-sum) and distributive (zero-sum) bargaining. Some scholars use the terms ‘win-win’, ‘win-lose’, or ‘principled negotiation’. In this thesis, the term *negotiation* includes all these variations.<sup>37</sup>
14. *Non-zero-sum Bargaining* (also known as *integrative* or *mutual gains* scenario) – defined as ‘when parties’ goals are linked so that one person’s goal achievement helps others to achieve their goals... [such that there is a]...positive correlation between the goal attainments of both parties.’<sup>38</sup>
15. *Occupation* – defined as ‘an activity in which one engages; the work in which one is regularly employed; the principal business of one’s life; vocation’.<sup>39</sup>
16. *Profession* – defined as ‘a disciplined group of individuals who adhere to high ethical standards and uphold themselves to, and are accepted by, the public as possessing special knowledge and skills in a widely recognised, organised body of learning derived from education and training at a high level, and who are prepared to exercise this knowledge and these skills in the interest of others. Inherent in this definition is the concept that the responsibility for the welfare, health and safety of the community shall take precedence over other

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<sup>37</sup> Lewicki et al, above n 25, 3 (‘win-win situations such as those that occur when parties are trying to find a mutually acceptable solution to a complex conflict.’); Russell Korobkin (ed), *Negotiation Theory and Strategy* (2002) 1 (‘an interactive communication process by which two or more parties who lack identical interests attempt to find a way to coordinate their behaviour or allocate scarce resources in a way that will make them better off than they could be if they were to act alone.’).

<sup>38</sup> Lewicki et al, above n 25, 11.

<sup>39</sup> Merriam-Webster Dictionary Online, *Occupation* <<http://www.merriam-webster.com/dictionary/occupation>> at 9 August 2010; Merriam-Webster Dictionary Online, *Vocation* <<http://www.merriam-webster.com/dictionary/vocation>> at 9 August 2010.

considerations.’<sup>40</sup> A trade or occupation is transformed into a profession through the ‘the development of formal qualifications based upon education and examinations, the emergence of regulatory bodies with powers to admit and discipline members, and some degree of monopoly rights.’<sup>41</sup>

17. *Professional Code of Ethics* – defined as ‘the formal statement of standards which the professional consults to guide his or her behaviour. It represents a statement of the roles that professionals ought to assume in specific situations. To that extent, a code is a formalized statement of role morality, a unitary professional ‘conscience’.’<sup>42</sup> Professional ethics can also be defined as ‘the moral principles that regulate the behaviour of lawyers in a role.’<sup>43</sup>
18. *Strategy* – defined by business scholars as ‘the pattern or plan that integrates an organization’s major targets, policies, and action sequences into a cohesive whole.’<sup>44</sup> As applied to negotiations, a strategy is ‘the overall plan to accomplish one’s goals in a negotiation

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<sup>40</sup> Australian Competition and Consumer Commission, *Definition of a profession* <<http://www.accc.gov.au/content/index.phtml/itemId/277772>> at 9 August 2010.

<sup>41</sup> Alan Bullock and Stephen Trombley, *The New Fontana Dictionary of Modern Thought* (1999) 689; *Wolters Kluwer Fin. Servs., Inc v. Scivantage*, 525 F. Supp. 2d 448 (S.D.N.Y. 2007) (Baer, D.J.) (stressing that ‘[a] profession is not a business. It is distinguished by....a duty to subordinate financial reward to social responsibility...to conduct themselves as members of a learned discipline, and honorable occupation.’); Australian Competition and Consumer Commission, *Definition of a profession*, above n 40 (citing Dr John Southwick, ‘Australian Council of Professions’ view’, in *Can the professions survive under a national competition policy?* Proceedings of a joint conference on competition law and the professions, Perth, April 1997); Professions Australia, ‘Definition of a profession’ (2009) <<http://www.professions.com.au/defineprofession.html>> at 9 August 2010.

<sup>42</sup> Reed E Loder, ‘Tighter Rules of Professional Conduct: Saltwater for Thirst’ (1987-88) 1 *Georgia Journal of Legal Ethics* 311, 318.

<sup>43</sup> Robert Condlin, ‘The Moral Failure of Clinical Legal Education’ (1983) *The Good Lawyer* 317.

<sup>44</sup> Lewicki et al, above n 25, 105 (citing Henry Mintzberg and James Brian Quinn, *The Strategy Process: Concepts, Context, Cases* (1991)).

and the action sequences that will lead to the accomplishment of those goals.’<sup>45</sup>

19. *Tactic* – defined as ‘short term, adaptive moves designed to enact or pursue broad (or higher-level) strategies, which in turn provide stability, continuity, and direction for tactical behaviours.’<sup>46</sup> Tactics are subordinate to strategy and are considered structured manoeuvres driven by strategic considerations.
20. *Zero-sum Bargaining* (also known as *distributive*) – defined as ‘where the goals of two or more people are interconnected so that only one can achieve the goal...a competitive situation...in which individuals are so linked together that there is a negative correlation between their goal attainments.’<sup>47</sup>

## 1.8 ORGANISATION OF THESIS

This thesis is divided into eight primary chapters, organised as follows. The reader may refer to the Table of Contents in order to access specific chapters directly.

- o *Chapter 1 (Introduction and Rationale)* sets the foundation of the thesis by introducing the primary topic of the study, the background to the study, the significance of the study, contribution to knowledge, the research questions, an overview of the research methodology, a definition of key terms, and the organisation of the thesis.
- o *Chapter 2 (Review of Literature)* reviews the state of existing literature in the primary cross-disciplinary areas of the thesis and those which

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<sup>45</sup> Lewicki et al, above n 25, 105.

<sup>46</sup> Ibid.

<sup>47</sup> Lewicki et al, above n 25, 11.

surround the research questions. Chapter 2 reviews and analyses primary research in the areas of ethics, legal ethics, negotiation, and deception. After a critical analysis of existing literature, Chapter 2 attempts to place the importance of this qualitative research project in the context of existing knowledge to highlight the contribution to knowledge of this thesis.

- o *Chapter 3 (Alleged Deceptive Behaviours of Lawyers)* provides a detailed analysis and discussion of the research findings related to the first research question, namely whether lawyers use potentially deceptive behaviours in negotiation, to whom these behaviours are directed and the justifications used by lawyers to condone such behaviour. The purpose of this chapter is to establish that lawyers tend to use certain potentially deceptive behaviours in negotiation and attempt to justify these behaviours in a variety of ways, including the argument that such conduct is not prohibited under the legal ethics code of the prevailing jurisdiction.
- o *Chapter 4 (Efforts by Professional Ethics Codes to Regulate Deceptive Behaviours in Negotiation)* addresses the second research question, namely whether professional ethics codes attempt to regulate potentially deceptive negotiation behaviour and to what extent the professional ethics codes consistently do so. The purpose of this chapter is to discuss the findings of a qualitative study of five common-law legal ethics codes. The study consists of a detailed analysis of

whether these legal ethics codes discuss negotiation and attempt to regulate deceptive or misleading conduct in negotiation.

- o *Chapter 5 (The Success of Professional Ethical Codes in Controlling Lawyers' Deceptive Behaviour)* focuses on the third research question, namely whether professional ethics codes appear to be successful in controlling the potentially deceptive behaviours of lawyers in negotiations. In addressing the third research question, I undertook a unique comparative analysis of ethics violation cases in Queensland over a ten-year period. Chapter 5 presents the results of this qualitative study of the ethics violation cases where the alleged violation consisted of misleading or deceptive conduct on the part of the lawyer with a focus on any cases where the violation occurred in a negotiation. The results of the qualitative analysis are interpreted and discussed in light of the overall purpose of this thesis and the research questions established in Chapter 1.
- o *Chapter 6 (The Foundation for Change)* provides a summary of key insights from Chapters 3, 4, and 5 in order to establish a foundation for the policy reform proposals presented in Chapter 7. Chapter 6 also includes the findings of several studies of the legal profession that focus on the extent to which consumers and the profession expect honesty and integrity in the conduct of legal professionals. These studies further reinforce the primary objective of Chapter 6, namely to establish the imperative for law and policy reforms and a call to action in addressing the issues highlighted by the research questions.

- o *Chapter 7 (Implications for Law Reform)* discusses a tripartite response to the issues presented and addressed in the previous chapters. This chapter consists of a set of integrated policy reform proposals in the areas of legal regulation, ethical standard setting and institutional design with a discussion of key benefits. In addition, this chapter presents a summary of key theories and techniques for encouraging behavioural change followed by a discussion about the goals and benefits that can be achieved by implementing the specific policy reform proposals.
- o *Chapter 8 (Thesis Summary and Conclusions)* provides a summary of the thesis and concluding remarks including suggestions for further research, implications of the findings to practice and the relationship of the results to existing theory.
- o *Appendices* include a variety of resources including a listing of figures and tables, a listing of cases, and the detailed results of the analysis of the Queensland ethics violation cases discussed in Chapter 5.
- o *Bibliography* includes the resources consulted in the production of this thesis.

## **1.9 CHAPTER CONCLUSION**

A fundamental question facing legal professionals today is how to maintain the integrity of the profession. This includes a financially viable legal practice as well as confidence in the public about the legal system. This issue arises as a result of the negative perceptions of lawyers as liars and manipulators even as lawyers are subject



to very strict ethical codes of conduct with regards to the use of deception in legal practice, including negotiations.

Negotiation is the one central task that lawyers engage in throughout the course of their daily practice. As such, how lawyers negotiate has a direct impact on how clients are served and how those same clients perceive the legal profession. In part, how lawyers should behave in practice is established through guidelines in the professional ethics codes. In general, these professional ethics codes prohibit deceptive conduct. However, lawyers as negotiators work in a world where it appears that some forms of deception are not only acceptable but expected. In such an environment, questions arise as to whether lawyers do actually engage in deceptive conduct in violation of professional ethics codes, whether professional ethics codes effectively curtail such behaviours and whether such attempts are successful or undermine the success of negotiations. If it is determined or perceived that the professional ethics codes do not effectively curtail the use deception in negotiation, the question arises as to what can be done to effectively address this ongoing issue.

The purpose of this chapter has been to set the foundation, rationale, and research questions to guide an enquiry into this complex issue through addressing four primary research questions. Chapter 2 is a review of literature followed by an examination of the theoretical and conceptual frameworks that underlie the study of these research questions.

## CHAPTER 2 – REVIEW OF LITERATURE

*‘Curiosity begins as an act of tearing to pieces or analysis.’*

*~ Samuel Alexander*<sup>48</sup>

This chapter provides a review of the literature designed to assimilate, summarise, and synthesise the existing published scholarly research in the areas of law, ethics, and negotiation which serve as the primary focus of this study. After introductory remarks, this chapter discusses competing perspectives, theoretical frameworks in the areas relevant to the study, and a conceptual framework for the proposed research questions. The chapter then provides a synthesis of the literature review, a critical analysis of existing published scholarly research, and a discussion of strengths, weaknesses, and gaps within the literature. Finally, this chapter highlights the importance of this study in addressing some of the gaps in the existing body of research.

### 2.1 INTRODUCTION

This literature review establishes the foundation which informs the need to address each of the research questions outlined in Chapter 1. First, this literature review describes and discusses the existing research into the cross-disciplinary areas affecting this study, namely legal negotiation, negotiation practices, and legal ethics. Second, this literature review serves to identify the gaps that will be addressed by this study. Finally, this literature review provides a basis for the policy reform proposals

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<sup>48</sup> Brainyquote.com, *Analysis Quotes* (2009)  
<[http://www.brainyquote.com/quotes/keywords/analysis\\_2.html](http://www.brainyquote.com/quotes/keywords/analysis_2.html)> at 9 August 2010.

outlined in Chapter 7 for addressing the issue of deception in legal negotiation. As Einstein once noted, one cannot expect to achieve different results by doing the same thing over and over again.<sup>49</sup> It is in this spirit of a fresh, multidisciplinary perspective that the literature review aims to establish the need for this study and for implementing an integrated set of policy reforms.

The criteria used for this literature review include: (1) empirical studies or significant recent research and analysis conducted on the thesis topics; (2) studies or significant research and analysis related to legal negotiations or general negotiations that might have a bearing on the research question(s); (3) studies or significant research and analysis related to societal ethics, legal ethics and negotiation ethics as well as the use of deception in negotiation; and (4) studies or significant research and analysis related to implementing behavioural changes, policy development and policy implementation.

The literature review focuses on a review of scholarly publications relevant to the problem statement and research questions as outlined in Chapter 1. A review of literature outside the bounds of the research questions was also conducted in order to get a balanced and cross-disciplinary view of the research problem, subsequent analysis, and recommended policy reforms. For example, ethics is primarily related to philosophy and, therefore, research into the philosophical context of ethics was

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<sup>49</sup> Brainyquote.com, *Albert Einstein Quotes* (2009)  
<<http://www.brainyquote.com/quotes/quotes/a/alberteins133991.html>> at 9 August 2010 ('Insanity: doing the same thing over and over again and expecting different results.').

done to better understand similarities and differences with bargaining<sup>50</sup> ethics and legal ethics.

## **2.2 COMPETING PERSPECTIVES**

The purpose of this section is to briefly discuss some of the competing perspectives in the field as they relate to key topics relevant to this thesis. A discussion of competing perspectives is designed to acknowledge the different perspectives across disciplines related to the problem statement and research questions outlined in Chapter 1.

The purpose of discussing competing perspectives in these areas is to ensure that the reader is aware that such competing perspectives impact the ability to answer the research questions and set the foundation for recommending the policy reform proposals in Chapter 7. An understanding and clear definition of the competing perspectives will also help contribute to knowledge.

### **2.2.1 Lies Versus Deception: Competing Definitions**

One of the most obvious areas of some disagreement is whether lies are the same as deception or only a form of deception and whether one can be condoned while the other is not. This section considers these competing definitions in light of its impact on the legal profession.

As defined in Chapter 1, a lie is a false statement made with the intent to deceive, an intentional untruth.<sup>51</sup> Some scholars distinguish between two categories of lies and their distinct applications as presented below in Table 2.1.

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<sup>50</sup> Norton, above n 19, 282 (defining ‘*bargaining*’ as ‘a self regulated process by which parties with different goals engage in strategic dealings until they agree upon an outcome, or until one or more of them decides that agreement cannot be reached.’).

<sup>51</sup> *The Random House Dictionary of English Language*, above n 33, 1109; *The Oxford English Dictionary*, above n 33, 899; *Cf* Wetlaufer, above n 31, 1223 (defining lying to include ‘all means by

**Table 2.1: Two Categories of Lies**

Pure ‘white’ lies / lies to save face <sup>52</sup>	Distributive lies <sup>53</sup>
<ul style="list-style-type: none"> <li>• fairly harmless</li> <li>• meant to just ‘grease the wheels of discourse’ – move things along</li> <li>• focus is still on achieving a mutually acceptable agreement</li> <li>• lie is not intended to gain an advantage over the other party or to disadvantage the other party</li> </ul>	<ul style="list-style-type: none"> <li>• primary purpose is to gain an advantage over the other person</li> <li>• there is intentional lying to secure the advantage</li> <li>• includes lies about the nature, history, and value of the subject of negotiations, false promises, false threats, and false predictions as to the value of the subject of negotiations and lies about our clients’ opinion or expectations</li> </ul>

Unlike pure ‘white’ lies, if distributive lies are believed and effective, the ‘liar becomes richer in the degree to which the victim becomes poorer.’<sup>54</sup> Distributive lies are inherently part of distributive bargaining because the assumption is that each party is trying to claim the maximum value out of a fixed pie. Distributing bargaining involves a win-lose mentality, where lying is central to gain maximum advantage.

Deception, on the other hand, can be defined as ‘the business of persuasion aided by the art of selective display’ put into effect by two primary behaviours: ‘hiding the real and showing the false.’<sup>55</sup> It is an intentional distortion of the truth so as to mislead others in order to gain advantage for the practitioner such that deception, rather than something being false, is at the essence of the lie.<sup>56</sup>

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which one might attempt to create in some audience a belief at variance with one’s own.’); Bok, above n 33, 14 (‘any intentionally deceptive message which is stated.’).

<sup>52</sup> Wetlaufer, above n 31, 1225-1226. See also J Bowyer Bell and Barton Whaley, *Cheating and Deception* (1991) 48-52.

<sup>53</sup> Wetlaufer, above n 31, 1224-1227.

<sup>54</sup> Wetlaufer, above n 31, 1227.

<sup>55</sup> Cooley, above n 27, 263; Nyberg, above n 27, 66-67.

<sup>56</sup> See, eg, Joseph W Caddell, *Deception 101 – Primer on Deception* (2004) 1; Francis Mechner, *Using Behavioural Contingency Analysis to Classify the Various Forms of Deception* (2009) 1-68 < <http://mechnerfoundation.org/newsite/downloads.html>> at 9 August 2010; Bell and Whaley, above n 52, 48-52.

Deception may be of two varieties, concealing the truth or exhibiting false information, both of which are described below in Table 2.2.

**Table 2.2: Two Varieties of Deception**

Concealing the Truth	Exhibiting False Information
<ul style="list-style-type: none"> <li>includes the ability to dissimulate or gloss over;</li> <li>Withhold information</li> </ul>	<ul style="list-style-type: none"> <li>accomplished by simulation</li> <li>Involves three techniques: 1) mimicry; 2) fabricate; and 3) attract.<sup>57</sup></li> </ul>
<p>Dissimulate = ‘concealing the truth, like inconvenient or secret information either by camouflage, disguising appearance, or dazzle.’<sup>58</sup></p> <p><b>Example:</b> in negotiation, concealing one’s true bottom line from the opposing party</p> <p><b>Example:</b> in military tactics, soldiers colour their faces and wear clothing to resemble the jungle or desert or other surroundings to conceal themselves from the enemy (camouflage)</p> <p><b>Example:</b> disguising oneself as someone else so that you are not recognised or mistaken for another person (disguise appearance)</p>	<p>In simulation, the primary goal is to convey false information by copying an existing model (mimicry), making up new information and presenting it as true (fabricate), or offering an alternative model (attract).<sup>59</sup></p> <p><b>Example:</b> in negotiation, this may involve making a verbal settlement offer that is accepted but the actual written settlement agreement is a different offer that conceals something that was not verbally agreed to.</p> <p><b>Example:</b> A used car salesman uses a bait and switch tactic to ‘attract’ the buyer to a tempting feature in order to conceal a fault such as bad tires (attract).</p> <p><b>Example:</b> A landlord of a commercial building telling a tenant that unless the tenant pays a higher yearly rent, the landlord will sell to another purchaser who wants the space knowing there is no other purchaser (fabricate).</p>

Lerman argues that regardless of the definition of either, both lies and deception are ‘morally identical’ in that the consequences are the same.<sup>60</sup> In the

<sup>57</sup> See, eg, Scott Gerwehr and Russell W Glenn, *The Art of Darkness: Deception and Urban Operations* (2000) 16-18; Mechner, above n 56, 1-6.

<sup>58</sup> Gerhwer and Glenn, above n 57, 16-18.

<sup>59</sup> Caddell, above n 56, 1; Gerhwer and Glenn, above n 57, 16-18.

<sup>60</sup> Lisa G Lerman, ‘Lying to Clients’ (1990) 138 *University of Pennsylvania Law Review* 659, 663.

context of the legal system, some scholars argue that lies and deception mean different things to lawyers. For example, Guernsey offers that a lawyer's definition of lying may be described as 'a statement made with the intent to deceive which purports to state the existence, in unequivocal terms, of facts and law contrary to the declarant's express knowledge.'<sup>61</sup> By comparison, noted ethicist Sisela Bok defines a 'lie' as 'any intentionally deceptive message which is stated.'<sup>62</sup> Among other things, Guernsey dismisses noted ethicist Sisela Bok's definition of a 'lie' as being too broad in that it would 'preclude negotiation since inherent in all negotiations is some element of an attempt to mislead the other side.'<sup>63</sup>

From the above discussion, it appears that the deception is imbedded in the lie. Deception can be considered a negotiation strategy and telling a lie is a tactic that may be used to achieve the goal of deceiving the other party by expressly stating an untruth. While there is some common ground amongst the competing views on the definition of deception or lies, there are strong competing views on whether deception is an inherent negotiation strategy.

### **2.2.2 Deception as a Negotiation Strategy**

Whether deception is or should be an acceptable negotiation strategy attracts considerable attention in both negotiation and legal literature. Negotiation literature seems to generally accept and allow that at least some forms of deception are an inherent part of the bargaining dance.<sup>64</sup> In fact, some scholars argue that without

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<sup>61</sup> Guernsey, above n 34, 105; James J White, 'Machiavelli and the Bar: Ethical Limits on Lying in Negotiation' (1980) *American Bar Foundation Research Journal* 926 (stating unequivocally that deception is part of every negotiation)

<sup>62</sup> Bok, above n 33, 13.

<sup>63</sup> Guernsey, above n 34, 105 n34.

<sup>64</sup> See, eg, Lewicki et al, above n 25, 3; White, above n 60; Guernsey, above n 34, 105 n.34 (stating that '...inherent in all negotiations is some element of an attempt to mislead the other side.'). This view has

deception, there would be no true negotiation.<sup>65</sup> The view here is that the minor deception that occurs in negotiation is expected by the parties and even has some merit.<sup>66</sup> For example, Strudler argues that the truth can actually get in the way of a good deal.<sup>67</sup> He further contends that some forms of deception, especially non-disclosure of a negotiator's reservation price, serve as a 'a signalling and symbolic device that even strangers, people who neither know nor trust one another, can use to work their way to a reasonable and mutually advantageous agreement in an otherwise risky environment.'<sup>68</sup>

In contrast, those who argue against the use of deception in negotiation, particularly by lawyers, discuss the various harms caused by deceiving the various stakeholders of the legal justice system. For example, Rubin<sup>69</sup> holds a universalist view that a lawyer's societal obligations require honesty and good faith towards opponents, even in negotiations. Similarly, Norton argues that truth (i.e., absence of deception) is vital to negotiations, partly because it underlies the choices that parties make in negotiation and to ensure the validity and integrity of the agreement reached during negotiations.<sup>70</sup>

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been echoed in the various professional ethics codes and cases across international jurisdictions including Australia and United States.

<sup>65</sup> See, eg, White, above n 60, 926; Guernsey, above n 34, 105 n.34

<sup>66</sup> Selene Mize, 'Is deception in negotiating unprofessional?' (2005) *The New Zealand Law Journal* 246 ('Nevertheless, it is clear that deception sometimes contributes to a better deal.').

<sup>67</sup> Alan Strudler, 'On the Ethics of Deception in Negotiation' (1995) 5(4) *Business Ethics Quarterly* 805; Mize, above n 66, 246 ('Nevertheless, it is clear that deception sometimes contributes to a better deal.').

<sup>68</sup> Strudler, above n 67, 805.

<sup>69</sup> Alvin B Rubin, 'A Causerie on Lawyers' Ethics in Negotiations' (1975) 35 *Louisiana Law Review* 577

<sup>70</sup> Norton, above n 19, 273-274. See also George Sharswood, *Professional Ethics* (1844) 168-169 quoted in *Maryland State Bar Ass'n v Agnew*, 271 Md. 543, 548-49, 318 A.2d 811, 814 (1974) ('...[f]rom the very commencement of a lawyer's career, let him cultivate, above all things, truth, simplicity and candour; they are the cardinal virtues of a lawyer.').



### 2.2.2.1 Harms Caused By Deception

The use of deception in negotiation is said to cause a variety of harms, harms resulting either from the improper motives of the negotiator or the harmful consequences of unethical conduct at negotiations, such as an unconscionable agreement which takes unfair advantage of a negotiating party. As Lerman points out, the cost-benefit analysis ‘...to evaluate possible or actual consequences of a deception is fraught with difficulties because of the indeterminacy of events and the subjectivity of attempting to predict harmful consequences.’<sup>71</sup>

Lerman and many noted ethicists and legal scholars appear to agree that the use of deception in negotiation, particularly by lawyers, creates sufficient harm on multiple levels as to be considered unacceptable. The harms potentially caused by deception appear to fall into four main categories.

First, deception can cause *reputational harm* to the individual lawyer and the legal profession. Lerman argues that even the widespread use of small deceptions can affect the professional integrity of the lawyer as well as the reputation of the bar.<sup>72</sup> The accepted and unpunished use of smaller deceptions can lead the lawyer to conclude that such conduct is acceptable in all settings, thus affecting the lawyer’s internal standard of integrity by increasing the likelihood that the lawyer will engage in such conduct again.<sup>73</sup>

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<sup>71</sup> Lerman, above n 60, 679. Lerman, in particular, refers to the harms caused by ‘self-interested lawyer deception’ of clients in her study, which is discussed below.

<sup>72</sup> Lerman, above n 60, 679. See also Kang Lee et al, ‘Taiwan and Mainland Chinese and Canadian Children’s Categorization and Evaluation of Lie- and Truth-Telling: A Modesty Effect’ (2001) 19 *British Journal of Developmental Psychology* 527 (‘...[lie-telling] creates an internal conflict on the part of the lie-teller and cognitive dissonance in the lie-teller’s belief system, which can be hazardous to the lie-teller’s psychological well-being.’).

<sup>73</sup> Lerman, above n 60, 680 (quoting ethicist Sisela Bok as this being a ‘slippery slope’). See also Lerman, above n 60, n 81 (quoting Bok (1977) as stating that “[a]fter the first lies...others can come more easily. Psychological barriers wear down; lies seem more necessary, less reprehensible; the

Second, deception may *harm the lawyer's performance* in their professional duties and in their dealings with clients. If left unchecked, such deception can lead to neglect, error, substandard performance, and lack of expertise necessary to assist clients.<sup>74</sup> Where a lawyer deceives a client, the lawyer may 'dehumanize him or her, treating the client as an annoyance...a way of asserting superiority in the relationship with the client.'<sup>75</sup> This can also affect the way lawyers relate to other lawyers by creating a culture of unnecessary competition between senior and junior lawyers where 'the cost of deceiving one person is the exploitation of another.'<sup>76</sup>

Third, deception may *harm the negotiation process* itself. If deception is used in negotiation, it can 'cause a negotiation to falter and the bridge, being built by the negotiator to bring them together, to collapse.'<sup>77</sup> In addition, deception in the negotiation process limits each party's freedom of choice by affecting the party's ability to make informed choices based on all available information.<sup>78</sup> In turn, this can harm the relationship of the parties to the negotiation as deception tends to 'trigger, exacerbate or cause to exceed the expected effects of the heuristics and biases that already exist at the bargaining table.'<sup>79</sup> Ultimately, if freedom to make informed choices is compromised between the parties, this may result in an imbalance of the

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ability to make moral distinctions can coarsen; the liar's perception of his chances of being caught may warp.').

<sup>74</sup> Lerman, above n 60, 682 n 86.

<sup>75</sup> Lerman, above n 60, 683.

<sup>76</sup> Ibid.

<sup>77</sup> Cheryl Rivers (2004) *What are they thinking? Considerations underlying negotiators' ethical decisions* 3 (Paper presented at the 2004 Annual Meeting Academy of International Business Conference in Stockholm, Sweden).

<sup>78</sup> Lee et al (2001), above n 72, 527.

<sup>79</sup> See generally Russell Korobkin and Chris Guthrie, 'Heuristics and Biases at the Bargaining Table' (2004) 87 *Marquette Law Review* 795 (discussing the various heuristics and biases that operate at the bargaining table). Deception would seem to make such heuristics and biases even more prevalent.

distribution of power between the negotiating parties.<sup>80</sup> This leads to ‘altering [the] choices [of the negotiating parties] at different levels’<sup>81</sup> and may ultimately affect the degree to which the resulting agreement is successful in resolving the dispute.

Finally, deception in negotiation may *create economic harm*. A successful negotiation depends, in part, on trust among the parties. The use of deception in negotiation can undermine this trust or create barriers to building trust.<sup>82</sup> The parties to a negotiation may incur ‘losses sustained as a result of deception’<sup>83</sup> or deception may cause economic harm due to ‘benefits missed as a result of deception’<sup>84</sup> because the negotiation may be seen as means to an economic end rather than as a process to make informed choices and create mutually beneficial agreements.

While the actual and perceived harms caused by using deception in negotiation would deter lawyers and parties from engaging in such conduct, deception continues to be a key aspect of negotiations. It is even believed to contain benefits. The next section provides a discussion of some perceived benefits of deception in negotiation.

#### 2.2.2.2 Perceived Benefits of Deception in Negotiation

Many legal scholars, such as Strudler, Raiffa, White, and Mize, argue that deception in the context of negotiation can have benefits, especially if one takes the

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<sup>80</sup> Sisela Bok, ‘Truthfulness, Deceit and Trust’ in Carrie Menkel-Meadow and Michael Wheeler (eds) *What’s Fair: Ethics for Negotiators* (2004) 80.

<sup>81</sup> Bok, above n 80, 80 (‘Deception can make a situation falsely uncertain as well as falsely certain. It can affect the objectives seen, the alternatives believed possible, the estimates made of risks and benefits.’).

<sup>82</sup> Strudler, above n 67, 813. See also Bok, above n 80, 79 (describing deceit as violence in that it is a ‘deliberate assault on human beings. Both can coerce people into acting against their will. But deceit controls more subtly for it works on belief as well as action.’).

<sup>83</sup> Strudler, above n 67, 813.

<sup>84</sup> Strudler, above n 67, 815. Strudler discusses these impacts and ultimately concludes that with respect to deception of reservation prices, deception is a necessary and natural part of the process, such that we have to ‘haggle’ for a deal.

view that deception is an inherent part of negotiations, regardless of whether lawyers are involved.

First, Strudler argues against the notion that deception may cause an erosion of trust. He states that, in fact, deception occurs because there is a lack of trust to begin with.<sup>85</sup> He uses the example of selling one's car to a potential buyer and disclosing one's reservation price. In this scenario, Strudler argues that '...neither of us expects the other to tell the truth about [our reservation] price'<sup>86</sup> and that doing so, especially after the deal is concluded, 'will only be a source of resentment later.'<sup>87</sup>

Second, deception may also be such a predictable part of the process of negotiation that it can be a 'mutually advantageous tool' for both parties that might enhance trust rather than erode it.<sup>88</sup> Because both parties expect some form of deception as part of the negotiation process, they have already included built-in transaction costs to account for any time expended in bypassing any deception. Strudler argues that because everything people do has costs, one must go beyond just stating that deception incurs costs and is wasteful to actually finding ways to 'measure these costs against costs of alternative actions, and to take into account the advantages that flow from the action.'<sup>89</sup> For example, in the case of deceptive reservation prices, Strudler states that '...the advantages we enjoy as a result of a successfully completed

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<sup>85</sup> Strudler, above n 67, 812; See also White, above n 60, 926; Guernsey, above n 34, 105 n. 34.

<sup>86</sup> Strudler, above n 67, 812.

<sup>87</sup> Strudler, above n 67, 812 (citing Howard Raiffa, *The Art and Science of Negotiation: How to Resolve Conflicts and Get the Best Out of Bargaining* (1982) (referring to Raiffa's advice that people should not tell the other party their reservation price even after a successful negotiation).

<sup>88</sup> Strudler, above n 67, 813; Mize, above n 66, 246 ('Nevertheless, it is clear that deception sometimes contributes to a better deal.').

<sup>89</sup> Ibid.

negotiation may more than outweigh the disadvantages of the costs of deceptive negotiation.<sup>90</sup>

Finally, deception may, in some cultures and circumstances, be used as an effective indirect communication process to see how one might react to offers, counter-offers, and reservation prices.<sup>91</sup> In summary, both opponents and proponents of deception in negotiation seem to agree that such conduct may impact the success of a negotiation.

### **2.2.3 Definition of ‘Success’ in Negotiation**

A negotiation may be considered ‘successful’ for many reasons. For example, a negotiation may be successful simply because it is less costly and more economical than pursuing litigation, thus being more cost-efficient. It is for this reason that the legal system, at least with respect to civil disputes, is sometimes referred to as a landscape of ‘the vanishing trial’<sup>92</sup> as many more cases are settled via judge-assisted

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<sup>90</sup> Note: This is certainly a question well suited for an empirical study. See also Kang Lee et al’s study on lie- and truth-telling discussed in later sections on perceptions of lie-telling in a cross-cultural study involving Canadian, Chinese, and Taiwanese children.

<sup>91</sup> Strudler, above n 67, 817 (discussing how deception can ‘form part of an indirect process of communication, a process that is advantageous because it is less risky than more direct communication.’). Strudler gives the example of a situation in Spain where a taxi driver was posturing (using deception) to potentially get a higher rate for his services and to indicate he was willing to bargain but Strudler did not understand this as a cultural aspect of commencing a negotiation with the driver.

<sup>92</sup> Mark Galanter, ‘The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts’ (2004) 1(3) *Journal of Empirical Legal Studies* 459, 462-463 (showing through an extensive study that the number of trials and the trial rates have been declining over four decades, particularly in the United States federal courts). Cf David Spencer, ‘The Vanishing Trial Phenomenon’ (2005) 43(8) *Law Society Journal* 58 (‘In other words, the court’s data show that there is no conclusive evidence that trials in the court are vanishing.’); John Lande, ‘Shifting the Focus from the Myth of ‘The Vanishing Trial’ to Complex Conflict Management Systems, Or I Learned *Almost* Everything I Need to Know about Conflict Resolution from Marc Galanter’ (2005) 6 *Cardozo Journal of Conflict Resolution* 191 (arguing that ‘the vanishing trial’ is a myth and discussing the importance and role of trials in conflict resolution).

settlement conferences, party-to-party mediation, or lawyer-to-lawyer negotiation rather than trial.<sup>93</sup>

As discussed above, these negotiations seem to invite a certain amount of acceptable deception. However, regardless of the possibility that ‘estimates of costs and benefits of any action can be endlessly varied through successful deception’,<sup>94</sup> proponents of using some deception in negotiation would argue that, in the final analysis, the advantages of a successfully completed negotiation in which each party is satisfied of the outcome may outweigh the disadvantages of some deception as part of the bargaining process.<sup>95</sup> Under this view, a negotiation is considered successful because an agreement is reached, regardless of how ethically it was achieved or perceived by the parties to the negotiation.

A negotiation may also be considered ‘successful’ because it produces a ‘good outcome’.<sup>96</sup> Bordone, who also argues for having negotiation recognized as an independent dispute resolution process,<sup>97</sup> describes a good outcome in negotiation as an agreement having the following characteristics:

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<sup>93</sup> It should be noted that settlement conferences and mediation have negotiation as the foundation from which to bargain for concessions, cross-offers and the like.

<sup>94</sup> Bok, above n 80, 80.

<sup>95</sup> Strudler, above n 67, 813 (specifically discussing deception of reservation prices); White, above n 60, 929 (arguing that deception is inherently part of negotiation and attempts to regulate it are futile).

<sup>96</sup> Robert C Bordone, ‘Fitting the Ethics to the Forum: A Proposal for Process-Enabling Ethical Codes’ (2005) 21 *Ohio State Journal on Dispute Resolution* 1, 16 (According to Bordone, a ‘good outcome’ in litigation may be ‘defined by measuring whether justice was achieved, a right was vindicated, or appropriate reparations were made... whether the resolution of a matter is ‘successful’ can often be boiled down to a binary question of whether a particular litigant won or lost.’ The definition of a ‘good outcome’ in negotiation is different.)

<sup>97</sup> Note: Negotiation could be considered a separate process as well as part of another dispute resolution process, such as mediation. While Bordone recognises that negotiation is generally understood to be part of mediation, he also argues for negotiation to be recognised as a separate process as well because it is largely unregulated as practiced by lawyers or it is regulated by legal ethics codes based on a litigation/adversarial philosophy. See also Norton, above n 19, 270-272 (‘...a lawyer who would tell the whole truth in court might tell a half-truth if the same matter were being resolved in the privacy of negotiations.’).

‘a) is better than our best alternative to a negotiated agreement (BATNA); b) meets our interests very well, the interests of the other side acceptably, and the interests of any third parties who may be affected by the agreement at least tolerably enough to be durable; c) is the most efficient and value-creating of many possible sets of deal terms; d) is based on a norm of fairness or some objective standard, criterion, or principle that is external to the parties themselves; e) identifies commitments that are specific, realistic, and operational for both sides; f) is premised on clear and efficient communication; and g) improves or at least does not harm the relationship between the parties where ‘relationship’ is defined as the ability of the parties to ‘manage their differences well.’<sup>98</sup>

Against this standard, it would appear that any kind of deception during negotiation, regardless of whether it is expected or acceptable, would only undermine a foundation necessary to create a good outcome, primarily because such deception would impact a level of trust<sup>99</sup> necessary to achieve all the elements of Bordone’s ‘good outcome’ test.

A third way in which a negotiation may be deemed a ‘success’ is due to its efficiency in resolving the issues between the parties. This type of efficiency is different from a negotiation being cost effective in that, for example, an efficient negotiation may be costly but the issues are dealt with in a timely manner with mutually beneficial outcomes. Peters argues ‘...efficiency is and ought to be a goal of negotiations.’<sup>100</sup> Peters refers to the traditional micro-economic sense of efficiency where the goal is the most optimal solution to an issue between the parties.<sup>101</sup> Where

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<sup>98</sup> Bordone, above n 96, 16-18; See also Roger Fisher, ‘A Code of Negotiation Practices for Lawyers’ (1985) 1 *Negotiation Journal* 105, 107-108.

<sup>99</sup> See, eg, Norton, above n 19, 273-275 (discussing the impact of standards of honesty in negotiation); David Lax and James K Sebenius, ‘Three Ethical Issues in Negotiation’ in Carrie Menkel-Meadow and Michael Wheeler (eds) *What’s Fair: Ethics for Negotiators* (2004) 5-7.

<sup>100</sup> Geoffrey M Peters, ‘The Use of Lies in Negotiation’ (1987) 48 *Ohio State Law Journal* 1, 22.

<sup>101</sup> Peters, above n 100, 23 (discussing the scenario where two people are fighting over an orange where one person wants the orange to bake a cake and the other person wants to drink the juice. Peters states that the most efficient and optimal solution is not to divide the orange into half but to give one person

a negotiation is considered a ‘zero-sum game’,<sup>102</sup> Peters states that distinguishing between lies and deception is not necessary or important with regards to efficiency because the effect is the same.<sup>103</sup> For example, in a used-car sales negotiation, both parties have a maximum price or position. The buyer’s goal is to pay as little as possible while the seller’s goal is to get as much as possible for the used car. The primary concern is getting a deal within the bargaining range such that if a deal is reached, the negotiation is efficient and successful.<sup>104</sup> In a zero-sum bargaining situation, Peters argues that all settlements are efficient and that a ‘failure to reach a settlement is inefficient where there is a bargaining range.’<sup>105</sup> This view appears to be based on the notion that parties to the negotiation will have an overlapping bargaining range (e.g., a range between \$5,000 (buyer’s limit) and \$6,000 (seller’s limit)) where settlement is possible simply due to the range of alternatives as defined by the bargaining range. As such, the parties will either reach agreement along some point on the bargaining range or, if they find out each other’s price limit, simply find another way to reach agreement.<sup>106</sup> Therefore, even if deception is part of the negotiation, a successful negotiation is one in which parties who have a bargaining range, whether overlapping or not, reach a settlement.

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the entire peel and the other person the juice of the orange, leaving both parties satisfied of their interests.)

<sup>102</sup> See Section 1.7 (Definition of Key Terms) for the definition of ‘zero-sum’ bargaining as used in this thesis.

<sup>103</sup> Peters, above n 100, 29-30.

<sup>104</sup> Peters, above n 100, 26-30 (describing a zero-sum negotiation for a used car between two parties and the impact of distinguishing between lies and other forms of deception). In Peters’ efficiency view, he appears to focus on the immediate goal (agreement) in favour of more long-term issues of the use of deception (trust, relationships, etc) presumably because many times such zero-sum negotiations are single or one-time negotiations with price as the primary focus. Cf Peters, above n 100, 29-30 (citing the American Law Institute’s view that ‘Hard bargaining between experienced adversaries of relatively equal power ought not to be discouraged.’ *Restatement (Second) of Contracts* § 176 comment f (1981)).

<sup>105</sup> Peters, above n 100, 29-30.

<sup>106</sup> Peters, above n 100, 29-31.



Under this view, and specifically in regards to zero-sum negotiations, it appears that deception is simply an expected variable invited by the competitive nature of zero-sum bargaining that does not necessarily affect the efficiency of the final outcome.<sup>107</sup> In fact, Shelling seems to argue that there are social benefits to deception and that without some form of deception, there would be no settlement in zero-sum negotiations.<sup>108</sup>

With respect to non-zero-sum negotiation,<sup>109</sup> Peters, along with others, seem to concur that tactics such as all forms of deception ‘interfere... with reaching efficient results, and we deplore the inefficiency they introduce.’<sup>110</sup> The reason deception leads to inefficiency in non-zero-sum negotiations is because such negotiations involve more than just a distribution of resources. Intangible components such as personal relationships, on-going business relationships, non-monetary concessions, and future commitments are valued and important aspects of these types of negotiations. Deception, if detected during or after the negotiation, tends to erode the trust necessary to ensure that the respective parties fulfil their mutual obligations under an agreement. If the agreement is built on unstable foundations, it will not last and the negotiation will have potentially been considered a failure.

In summary, the success of a negotiation may hinge on whether deception played a role and the extent to which such deception was perceived as harming or benefiting the final outcome of the negotiation. This perception also depends on the lawyers’ and parties’ view of certain theoretical perspectives about the nature of law,

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<sup>107</sup> Peters, above n 100, 30.

<sup>108</sup> Peters, above n 100, 30 (citing Thomas Schelling, *The Strategy of Conflict* (1963) 22, 67 quoted by H Laurence Ross, *Settled Out of Court: The Social Process of Insurance Claims Adjustment* (1980) 159-60, n 17-19)

<sup>109</sup> See Chapter 1, Section 1.7 (Definition of Key Terms) for the definition of ‘non zero-sum’ bargaining as used in this thesis.

<sup>110</sup> Peters, above n 100, 32.

negotiation, ethics, and deceptive behaviour. The next section explores the theoretical framework underlying some of the key areas of this thesis relative to the research questions.

## **2.3 THEORETICAL FRAMEWORK**

The purpose of this section is to discuss the theoretical constructs of various disciplines relevant to the research questions of this thesis. As defined by Strauss and Corbin, a theory ‘incorporates a set of well-developed concepts related through statements of relationship, which together constitute an integrated framework that can be used to explain or predict phenomena.’<sup>111</sup> In general, the theoretical framework is composed of ‘the long-standing theoretical traditions, theoretical principles, and relationships between the principles and traditions.’<sup>112</sup> By understanding the theoretical framework, one can see the cross-disciplinary nature of the issues posed by the research questions as well as identify potential solutions, where applicable.

### **2.3.1 Theories of Law**

Law is central to the regulation of behaviour, whether of society or of legal professionals. An understanding of the major theories of law is important as the key areas of the research questions (rules, ethics, and negotiation) intersect the two major theories of law, namely legal positivism and natural law.

Carvan identifies at least two major theories of law which directly affect the creation, application, evolution, and interpretation of rules and codes of conduct affecting legal professionals and the legal system. One theory, legal positivism, is the

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<sup>111</sup> Anselm Strauss and Juliet Corbin, *Basics of qualitative research: Grounded theory procedures and techniques* (1990).

<sup>112</sup> Günter Krumme, *Phases, stages and steps in geographic investigation* (2000) <<http://faculty.washington.edu/krumme/guides/researchguide.html>> at 9 August 2010; Calabrese, above n 14, 25.

more dominant theory in use today within the adversarial system.<sup>113</sup> Legal positivism appears to reject the natural law theory and thus generally sees little value of ‘any religious or humane basis for laws.’<sup>114</sup> According to legal positivists, ‘a law is a law because it is a law’ and its validity depends on some clearly defined reason rather than on any moral values.<sup>115</sup> Under legal positivism, the test for whether a law is valid is ‘whether the law benefits the greater good of the people’, a primarily utilitarian perspective.<sup>116</sup> For traditional legal positivists, such as John Austin, laws must derive from ‘positive’ sources such as the commanding sovereign who creates laws and then imposes a sanction for violating such laws.<sup>117</sup>

Modern legal positivists, such as Hart, see the legal system as consisting of primary and secondary rules. Primary rules include rules ‘that impose an obligation... [that may be] by social pressure supported by physical sanctions’ and those that are necessary for a functioning society.<sup>118</sup> Secondary rules appear to be demonstrative of

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<sup>113</sup> See generally, Carvan, above n 2, 5 (‘This seeking out of the truth by examination, cross-examination, and re-examination is the foundation of the adversary system. In this country [Australia], we mostly use the adversary system in legal proceedings. Other countries use different procedures to resolve conflict or to find the truth.’) This is ironic because many would argue that it is the adversarial model which not only perpetuates deception but does so in a way that also keeps many, including the stakeholders of the system, from finding the truth. See also Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (1789) (Bentham is considered one of the first utilitarian philosophers to see a conceptual difference between law and morality).

<sup>114</sup> Carvan, above n 2, 4; See also Jonathan Crowe, *Legal Theory* (2009) 31-32 (‘...legal positivists claim that morality plays no necessary role in *determining legal validity*....the question of what the law is can be logically separated from the question of what the law ought to be...often called the *separation thesis*.’ (emphasis in the original))

<sup>115</sup> See, eg, Tony Honoré, ‘The Dependence of Morality on Law’ (1993) 13 *Oxford Journal of Legal Studies* 1, 1-17 (arguing that ‘law will sometimes make morally binding what was not binding apart from its being so required’); See also Tony Honoré, *The Necessary Connection Between Law and Morality* (2008) , 2 (discussing the connection between positivism and morality); Crowe, above n 114, 30 (‘... whether a law is valid necessarily depends on certain socially recognised facts and events, such as whether it has been issued in the appropriate form by a recognised legal authority.’).

<sup>116</sup> Carvan, above n 2, 4; Crowe, above n 114, 30.

<sup>117</sup> Carvan, above n 2, 4; Crowe, above n 114, 30-31 (discussing the distinction between exclusive positivism, as argued by Joseph Raz and inclusive legal positivism); See also Joseph Raz, *The Authority of Law* (1979) 45-52.

<sup>118</sup> Carvan, above n 2, 5 (discussing Hart and listing prohibition of murder and theft as examples of primary rules.). See also H L A Hart, *The Concept of Law* (2<sup>nd</sup> ed, 1994) 250-254.

an 'advanced legal system' because secondary rules complement and support primary rules by 'provid[ing] a system of change in the rules that govern that society as it develops' as well as a viable system of resolving disputes. Common law countries, such as the United States and Australia, may be considered advanced legal systems by this definition since judicial decisions, for example, provide a mechanism to resolve disputes as well as a means of changing and evolving law as the country develops.

Legal positivism appears to be primarily a system of rules and codes of conduct created by humankind that punishes those who violate them rather than a system of law derived from higher principles or with the intent of rewarding and encouraging good behaviours. This is not to say that legal positivism does not encourage good behaviour; however it attempts to or hopes to encourage good behaviour through a system of punishing those who engage in behaviour that is deemed unacceptable or violating established laws and codes of conduct as defined by society or those in positions of political power.

In contrast to legal positivism, the natural law theory recognizes the existence of 'a natural or divine reason for the existence of laws.'<sup>119</sup> Natural law can be defined as: 1) universally applicable; 2) unchangeable; and 3) superior law to human-made laws.<sup>120</sup> The primary difference between legal positivists and natural law theorists is that legal positivists would require persons to obey a law simply because it is considered law and explicitly codified as such. In contrast, natural law theorists believe that a law is valid when it is based on natural law principles and 'reflects the principles by which we *should* live.'<sup>121</sup> Natural law theorists argue that traditional

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<sup>119</sup> Carvan, above n 2, 4.

<sup>120</sup> Ibid.

<sup>121</sup> Ibid (emphasis added).

sources of law should be supplemented by an additional moral test. According to natural law theorists, legal validity is determined by a two-pronged test: 1) a source based test that looks at explicit, codified rules; and 2) a moral component that looks at the moral purpose of the law.<sup>122</sup> Natural law generally reflects and takes into account moral values to a greater degree than legal positivism. For example, natural law might state that it is immoral to kill someone and oppose the death penalty. However, legal positivism in many countries allows the judicial system (state) to condemn a man to death and to carry out the death penalty as a matter of law. This creates a tension between natural law theorists and legal positivists about how society ought to live and how law can be codified to benefit citizens.

In the context of this thesis, understanding the distinction between these two theories of law is paramount if one is to gain insight into the complex issues of the nature of deception in negotiation by legal professionals. Lawyers are meant to uphold the codified law in the positivist sense such that by the professional ethics codes, lawyers are generally forbidden to lie in the course of their professional duties. These duties may also apply to their private dealings to the extent that they impact the nature of the legal profession. At the same time, lawyers daily interact with and serve the public, whose views on acceptable deception in negotiation cross the boundaries between codified law and natural law principles. The question arises as to whether negotiations conducted by lawyers should be subject to strict positivist laws or whether lawyers ought to be able to use some forms of deception because such deception is natural to society's expectations of bargaining behaviour. A related enquiry is the extent to which either positivist rules (laws and ethics codes) or natural

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<sup>122</sup> Crowe, above n 114, 10, 30 (discussing the validity of law according to legal positivists and natural law theorists).

principles (values, morals) provide the most successful means of dealing with the issues posed by the research questions.

An understanding of the tension between these two theories of law is also important because ethics is a function of natural law and what is deemed ethical or considered an ethical course of action (i.e., what one ought to do in a given situation) sometimes clashes with what is considered a legal or non-legal course of action in the life of a legal practitioner, particularly in the case of negotiation, a process that intersects both law and ethics. To the extent that there is a marked difference between negotiation behaviour that is legally acceptable versus that which is ethically permissible, the legal practitioner will likely face an ethical dilemma,<sup>123</sup> especially if his/her own personal ethics is also at odds with the jurisdiction's legal ethics and the prevailing bargaining ethics.

### **2.3.2 Theories of Ethics**

As previously discussed, ethics plays an important role in establishing and measuring acceptable behaviour. The purpose of this section is to present some divergent views on general societal ethics as well as legal ethics. This section also discusses the distinction between ethics and morals. In the context of this thesis, understanding these divergent yet co-existing views will help explain why the issue of deception in negotiation is complex and the impact of various influences on negotiation behaviour.

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<sup>123</sup> See Chapter 1, Section 1.7 (Definition of Key Terms) for a definition of 'ethics' and 'morals' as used in this thesis. In the context of this thesis, an ethical dilemma is one where the legal practitioner is unsure of proper course of action in terms of what is right or wrong, either by social standards or one's own moral (individual) standards of right and wrong.

### 2.3.2.1 Introduction

At the start, *ethics* needs to be distinguished from *morals* and from *legal ethics*, though they are sometimes used interchangeably.

*Ethics* includes the various theories and schools of thought that attempt to describe the kind of moral action, conduct, motive or character that a society ought to embody and how society *ought* to behave.<sup>124</sup> In addition, ethics is considered by some as even more stringent than *custom*, defined as the need to conform to the behavioural patterns of a community, whether personal or professional.<sup>125</sup> For example, in the context of this study, where ethics states that lawyers must be honest and maintain candour in their professional capacity, the custom of negotiation in personal injury cases may tacitly require that personal injury lawyers use some forms of deception.<sup>126</sup>

*Legal ethics* is a special subset of ethics and may be defined as '[u]sages and customs among members of the legal profession, involving their moral and professional duties towards one another, towards clients, and toward the courts.'<sup>127</sup>

In contrast to ethics or legal ethics, *morals or morality* is 'the law of conscience'.<sup>128</sup> Morals are generally considered a personal standard of what is right or wrong, perhaps based on an aggregate view of the ethical rules and principles.

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<sup>124</sup> *Black's Law Dictionary*, above n 28, 553; See also Lewicki et al, above n 25, 236; Bobette Wolski, *Legal Skills: A Practical Guide for Students* (2006) 23.

<sup>125</sup> Wetlaufer, above n 31, 1236.

<sup>126</sup> See, eg, Rob Davis, 'Negotiating Personal Injury Cases: A Survey of the Attitudes and Beliefs of Personal Injury Lawyers' (1994) 68 *Australian Law Journal* 734.

<sup>127</sup> *Black's Law Dictionary*, above n 28, 894. See also Bagaric and Dimopolous, above n 43, 3; Wetlaufer, above n 31, 1235-1236; Wolski, above n 124, 23 (referring to this as rules which 'encompass the ethical standards of the profession – that is, these are the standards for determining what is right or wrong in a particular situation.').

<sup>128</sup> *Black's Law Dictionary*, above n 28, 1008 ('Moral law'). See also Wolski, above n 124, 23 (defining morals as 'individual and personal beliefs about what is right and wrong' (citing Roy J Lewicki, Bruce Barry, David M Saunders and John W Minton, *Essentials of Negotiation* (2003) 236).

More importantly, morals are ‘cognizable and enforceable only by the conscience or by the... [moral sense] of right conduct, as distinguished from positive law.’<sup>129</sup>

Morality is sometimes a ‘product of communal life’ resulting in a personal sense of what is right and wrong as developed during the socialization process, such as through the family, community life, and the environment in which one lives.<sup>130</sup> The result is a personal conscience as a by-product of ‘the ideals we aspire to, the beliefs to which we attach particular significance, the essence of our desire...signpost giving meaning to our lives.’<sup>131</sup>

Morality, unlike law, is concerned with fairness and choice such that being *legally* right is not the same thing as being *morally* right.<sup>132</sup> Morals do not require strict or logical proof and are based simply on a sense, a belief, or even a conviction of what is right or wrong.<sup>133</sup> Morals may have a randomness that the law tries to ‘correct’ by imposing a societal standard of what constitutes appropriate and acceptable conduct so as to maintain some sense of civil order. Of course, each one of these – business customs, legal ethics, and personal morals – can be opposing forces during a negotiation.

#### 2.3.2.2 Ethics, Legal Ethics, and Morality Distinguished

In addition to differences in definition between ethics, legal ethics and morality, some argue that ethics is more stringent than law, law less stringent than ethics.<sup>134</sup> Whereas *law* must deal with such external factors as problems of ascertaining the facts of the past events, motives of the person charged, possibility of

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<sup>129</sup> *Black’s Law Dictionary*, above n 28, 1008 (‘Moral’, part 2).

<sup>130</sup> Hugh Mackay, *Right & Wrong* (2004) 26.

<sup>131</sup> Mackay, above n 130, 18.

<sup>132</sup> Mackay, above n 130, 37.

<sup>133</sup> Note: Whether morals can be proved and thus have an underlying logical proof is debatable.

<sup>134</sup> Wetlaufer, above n 31, 1235.



error, data conflicts, and the transaction costs of trying to do justice, *ethics* sometimes transcends such limitations. The legal process must overlook or allow for certain deceptions that either have little or no effect on the outcome of the case or are difficult or impossible to prove.<sup>135</sup> For this reason, it appears that *legal ethics* is especially formulated to work within the ‘limitations’ of the law, thus the perception that the legal professionals’ code of ethics is not really ‘ethics’.<sup>136</sup> For example, law and legal ethics is concerned with deception as it relates to what might be ‘material facts’<sup>137</sup> whereas societal ethics or personal morals does not make this distinction.

In brief, the differences between legal ethics, societal ethics, and morality, whether actual or perceived, could potentially create conflicts of perception with regards to the use of deceptive tactics in negotiation. Ethics, in particular, creates a layer of complexity when dealing with attempts to regulate deceptive behaviour, especially where such ethical norms collide with the ‘legal ethics’ of the legal profession.

### 2.3.2.3 Overview of Dominant Theories of Ethics

There are four predominant ethical philosophies from a society’s view of how one ought to behave.<sup>138</sup> First is *end-result ethics*, which argues that one should pursue a course of action that gets the greatest return on investment.<sup>139</sup> End-result ethics is

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<sup>135</sup> Wetlaufer, above n 31, 1235.

<sup>136</sup> Wetlaufer, above n 31, 1235-1236.

<sup>137</sup> See, eg, *Spector v. Mermelstein*, 361 F.Supp. 30, 40 (S.D.N.Y. 1972), modified on other grounds, 485 F. 2d 474 (2d Cir. 1973) (defining ‘material facts’ as those ‘which, if known to the client, might well have caused him, acting as a reasonable man, to alter his proposed course of conduct.’) See also Lerman, above n 60, 686 (referring to this as the ‘materiality standard’).

<sup>138</sup> Note: These could be debated. See, eg, Gordon Graham, *Eight Theories of Ethics* (2004) 126-161 (discussing utilitarianism in light of at least eight theories of ethics, from Immanuel Kant’s categorical imperative (lying is not appropriate under any circumstances) to act utilitarianism, rule utilitarianism, existentialism, hedonism, and consequentialism. In addition, a distinction is made between ethical philosophies as understood in general by society and noted philosophers (‘societal ethics’) and ethical models as proposed by negotiators (‘bargaining ethics’).

<sup>139</sup> Lewicki et al, above n 25, 236-237.

based on determining the rightness of an action by considering the consequences of the action. As such, end-result ethics can be regarded as utilitarianism, which is also a consequentialist doctrine.<sup>140</sup> End-result ethics, therefore, judges the *consequences* of the action, rather than the will or intention of the actor behind the action (Kantianism or duty ethics) or the authenticity or good faith with which the action is performed (Existentialism).<sup>141</sup> In the context of this thesis, legal positivism is generally utilitarianism or end-result ethics in action.

A second philosophy, *duty ethics*, states that the best course of action is one based on the duty to obey or uphold certain rules and principles, such as the law.<sup>142</sup> This means that one's actions should be guided by primary moral principles, or 'oughts' and that the ultimate good is 'a life of virtue (acting on principles) rather than pleasure.'<sup>143</sup> In the context of this thesis, legal professionals are considered duty bound to obey the legal ethics codes of their jurisdiction, even in negotiations.

A third ethical philosophy is *social contract ethics*, in which the best course of action is one in line with established customs, norms, values, and strategy of an organization or community,<sup>144</sup> such as codes of ethics, body corporate laws, and business industry customs and usage.

A fourth approach is *personalistic ethics*. Under this approach, the right course of action is based on one's personal conscience or convictions.<sup>145</sup> As such, personalistic ethics is most closely tied with morals.

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<sup>140</sup> Graham, above n 138, 139.

<sup>141</sup> Graham, above n 138, 137-138; Lewicki et al, above n 25, 241.

<sup>142</sup> Lewicki et al, above n 25, 236-237. Immanuel Kant is considered the founder of this philosophy, sometimes referred to as 'duty for duty's sake'.

<sup>143</sup> Lewicki et al, above n 25, 239.

<sup>144</sup> Lewicki et al, above n 25, 236-237.

<sup>145</sup> Ibid.

In summary, the dominant theories of ethics discussed above influence how society believes it ought to behave. The next section discusses theories of how the legal profession, through professional ethics codes, believes lawyers ought to behave and the ethics of eliciting such behaviours or punishing behaviour that violates these rules.

### 2.3.3 Theories of Legal Ethics

Ethics<sup>146</sup> is a fundamental guiding force of the legal profession. The legal ethics<sup>147</sup> rules shape not only the lawyer's behaviour but define the profession and its values. Therefore, the selection and enforcement of a particular legal ethics model is likely to drive corresponding behaviour.

Legal ethics can be understood as possibly consisting of two types of codes and two types of morality. Once again, this is the intersection between legal positivism and natural law principles. The two types of codes include disciplinary codes and aspirational codes. *Disciplinary codes* are written rules identifying 'a lowest common denominator of conduct below which offenders are punished'.<sup>148</sup> Disciplinary codes are technically rules made by the law societies or law associations. They generally identify the lowest common denominator of conduct by which lawyers should abide and conduct which is unacceptable. In most cases, disciplinary codes are reactive and punitive, not preventative and remedial. The rules could also be

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<sup>146</sup> See Chapter 1, Section 1.7 (Definition of Key Terms) for a definition of 'ethics' and 'morals' as used in this thesis. See also Richards, above n 28, 373; Lowenthal, above n 28, 413.

<sup>147</sup> Note: Legal ethics here incorporates a broad definition to include not just the legal ethics rules but also to mean 'leading our lives as lawyers, making decisions about our clients, our opponents, ourselves and our families, searching to be 'good lawyers' as well as 'good people'' (citing Carrie Menkel-Meadow, 'Portia Redux: Another Look at Gender, Feminism, and Legal Ethics' in Stephen Parker and Charles Sampford (eds) *Legal Ethics and Legal Practice: Contemporary Issues* (1995) 55.

<sup>148</sup> Charles Sampford with Christine Parker, 'Legal Regulation, Ethical Standard Setting, and Institutional Design' in Stephen Parker and Charles Sampford (eds) *Legal Ethics and Legal Practice: Contemporary Issues* (1995) 14; Ruth Fleet Thurman, 'Chipping Away at Lawyer Veracity: The ABA's Turn Toward Situation Ethics in Negotiations' (1990) *Journal of Dispute Resolution* 103.

considered self-interested as they are created and enforced by the professional associations, not by an external and disinterested group. So long as a legal professional does not violate the ‘rule’, s/he is free to do as s/he wishes.

*Aspirational codes*, on the other hand, are ‘the highest standards to which all should strive’. Aspirational codes go beyond providing guidance on sanctions for unacceptable behaviour and also prescribe higher and preferred standards of conduct expected of lawyers, conduct that is rooted in core values or a higher calling and mission. In the context of this thesis, the type of ethics code used will determine the extent to which behaviour can be specifically monitored, regulated, and enforced.

Two primary types of morality underpin or intersect the disciplinary and aspirational codes of ethics discussed above. The two types of morality are positive morality and critical morality. *Positive morality* is what many consider to be the appropriate standard of conduct for lawyers. It is rooted in the legal positivism<sup>149</sup> argument that drives most legal systems, especially common law systems. Positive morality, or ‘the moral customs actually practiced by a given society’ are codified in the disciplinary codes of the legal profession. According to Sampford, positive morality of legal ethics today seems to reinforce the ideas of the ‘moral majority’ in law and thus ‘denies the validity of claims that the way things are [might] not necessarily [be] the way they ought to be.’<sup>150</sup> This denial of other, more appropriate standards of behaviour by lawyers is a principal criticism of this approach. Rhode, for

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<sup>149</sup> Formulated by John Austin (1790-1859), legal positivism argues that ‘the existence and content of law depends on social facts and not on its merits. The positivist thesis does not say that law’s merits are unintelligible, unimportant, or peripheral to the philosophy of law. It says that they do not determine whether laws or legal systems *exist*. According to positivism, law is a matter of what has been posited (ordered, decided, practiced, tolerated, etc.); as we might say in a more modern idiom, positivism is the view that law is a social construction.’ (The Stanford Encyclopedia of Philosophy, *Legal Positivism* (2003) <<http://plato.stanford.edu/entries/legal-positivism/>> at 9 August 2010.

<sup>150</sup> Sampford and Parker, above n 148, 16.

example, criticises the bar and the profession for failing to see its own problems and taking steps to correct the current problems plaguing the profession.<sup>151</sup> This is caused, in part, by strict adherence to standards of behaviour as codified in the disciplinary codes, which might be out of step with the evolution of the profession and its role in society.

*Critical morality*, on the other hand, is a model where ‘individuals can debate, discuss, and criticize majority views, internalizing their own values and acting on them...allowing lawyers to question the way things are and to develop their ideas of how things ought to be.’<sup>152</sup> Values are central to the discussion of critical morality. The values important to critical morality are those which the individual finds compelling, not the values imposed by rules or a ‘moral majority’ with a legalistic view.<sup>153</sup> In this sense, one talks about legal ethics in the true context of ethics, not law. At the same time, critical morality does not attempt to completely undermine prevailing legal ethics principles. According to Sampford, critical morality can be applied to even the prevailing positive morality with an eye to applying a shared morality that lawyers can use to guide their actions.<sup>154</sup> In the context of this thesis, a particular provision of the legal ethics code may be driven by positive morality, such as the rules on client confidences. The provisions are usually designated by ‘must’ or ‘shall’ statements that appear to denote a required mandate. A lawyer would not be able to question, or be critical of, these provisions and must act in accordance with the provision (positive morality). However, another provision of the legal ethics code

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<sup>151</sup> See, eg, Deborah L Rhode, *In the Interests of Justice: Reforming the Legal Profession* (2000) 200-208.

<sup>152</sup> Sampford and Parker, above n 148, 16.

<sup>153</sup> Ibid.

<sup>154</sup> Ibid.

may allow the lawyer to use professional discretion in carrying out their duties. These provisions are usually identified as ‘should’ or ‘may’ statements. The lawyer may question the ethics code and act outside of it, where necessary (critical morality). The ethical dilemmas and tensions arise when the provisions of the legal ethics codes conflict as to what a lawyer must do in a professional capacity that goes against what a lawyer believes is the right course of action based on personal ethics or the prevailing ethics of the community or society at large. It is at these points where a lawyer who has developed critical morality may be able to better navigate ethical dilemmas and to make better judgments than one who feels strictly bound by the letter of the law under positive morality.

These notions of codes and morality underpin models of legal ethics. In addition to theories of social ethics,<sup>155</sup> theories of legal ethics exist to explain the type of ethical decision-making lawyers might engage in during the course of practice. As will be discussed further in Chapters 3, 4, and 5, the legal ethics codes define how lawyers ought to behave. Legal ethics codes may differ from theories of social ethics and are generally constructed on a prevailing legal ethics theory. The extent to which lawyers might use deception in negotiation may depend on the legal ethics theory being used by a given jurisdiction such that where there is explicit guidance on permissible tactics in negotiation, lawyers are expected to follow such guidance as opposed to a legal ethics code where no such guidance exists.

In the context of this thesis, understanding the express and implicit language of the legal ethics codes combined with an understanding of the major legal ethics theories is crucial to the analysis of the third research question, namely whether legal

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<sup>155</sup> See Chapter 2, Section 2.3.2 (Overview of Dominant Theories of Ethics) for a discussion on this topic.

ethics codes can and do successfully guide the negotiation behaviour of lawyers. The next section discusses the four major legal ethics theories beginning with the prevailing adversarial legal ethics model.

The primary and prevailing legal ethics theory, described by Parker and Evans as the *Adversarial Advocate* model,<sup>156</sup> is also referred to by many as the standard conception of lawyer ethics.<sup>157</sup> Under the *adversarial advocate* approach to legal ethics, the lawyer's role is governed by the adversarial legal process which requires that the lawyer's primary duty is to zealous advocacy on behalf of his/her client within the bounds of the law.<sup>158</sup> This approach is characterised by ensuring client autonomy, partisanship, loyalty to the client, and non-accountability.<sup>159</sup> Luban describes the standard conception of the lawyer's role<sup>160</sup> under the adversary model as consisting of: 1) 'a role obligation (the "principle of partisanship") that identifies professionalism with extreme partisan zeal on behalf of the client' and 2) 'the "principle of nonaccountability", which insists that the lawyer bears no moral responsibility for the client's goals or the means used to attain them.'<sup>161</sup>

The role obligation is based on the theory of role morality, as opposed to universal morality or even general social morality. Role morality under Luban's 'principle of partisanship' means that while there may be universal moral duties,

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<sup>156</sup> Christine Parker and Adrian Evans, *Inside Lawyers' Ethics* (2007) 14.

<sup>157</sup> Parker and Evans, above n 156, 14; David Luban, *Lawyers and Justice: An Ethical Study* (1988).

<sup>158</sup> Parker and Evans, above n 156, 21-23. Parker and Evans call this approach 'adversarial advocate' or 'the traditional conception'. A similar term, 'standard conception', is used by David Luban in referring to Gerald Postema's article in *New York University Law Review*. See Luban, above n 157; Thurman, above n 148, 103.

<sup>159</sup> Parker and Evans, above n 156, 21-23; Luban, above n 157.

<sup>160</sup> Gerald J Postema, 'Moral Responsibility in Professional Ethics' (1980) *New York University Law Review* 55, 73.

<sup>161</sup> Luban, above n 157.; Thurman, above n 148, 103; Carrie Menkel-Meadow, 'Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities' (1997) 38 *South Texas Law Review* 407, 429 (discussing the values of zeal, client loyalty, partisanship, and non-accountability that currently dominate the model rules of practice).

special duties go with various social roles or stations in life which may allow individuals in these particular social roles ‘to do things that seem immoral’ but are necessary in that role in society.<sup>162</sup> In some ways, the conduct occurring under role morality is said to be excused because of the special role even though social ethics or general morality might vehemently condemn such conduct. With regards to lawyers lying in negotiation, the principle of partisanship could explain how the use of deception in negotiation is not only allowed but also seen as expected and ethical. Partisanship naturally invites an intense competition against any person or interest not aligned with those of the client or the lawyer’s pursuit of zealous advocacy on behalf of his or her client. Competition under the guise of zealous advocacy might cause certain behaviours to be more pronounced than others, such as those common to distributive bargaining, including bluffing, puffing, deception, and intense focus on winning. Under the adversarial ethics model, lawyers might not even recognise certain deceptive behaviour in daily negotiations as unethical. On the contrary, as White<sup>163</sup> in his seminal US article, Lerman<sup>164</sup> in her US anecdotal study, and Wetlaufer<sup>165</sup> in his informal US study clearly demonstrate, lawyers appear to routinely justify deceptive behaviour as permissible and within the bounds of legal ethics codes. In addition, deceptive behaviour is not seen as deception at all but simply a part of a lawyer’s role as zealous advocates for their clients or as adopting a defensive posture because of the actions of opposing counsel. Perhaps the adversarial approach to legal

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<sup>162</sup> Luban, above n 157. Luban refers to general morality as ‘common morality’, a morality common to all people.

<sup>163</sup> White, above n 60, 929.

<sup>164</sup> Lerman, above n 60, 659.

<sup>165</sup> Wetlaufer, above n 31, 1219.



ethics is best summarised by the comments of a chief executive partner of Clayton Utz, a leading law firm in Australia:

‘Moral judgments have no place in the advice a lawyer gives to a client, according to the chief executive partner of Clayton Utz...He said: ‘The clients are entitled obviously to avail themselves of the full protection of the law and the lawyers are there to advance their clients’ interest subject to the constraints of their professional duties and, in particular, their duties to the courts. But if they operate within those constraints then they are acting appropriately. He said a lawyer might advise on the ‘appropriateness’ of different strategies, but it was wrong for a lawyer to make moral judgments. ‘We don’t take a moral stance and it’s not up to us, as advocates for a client, to take a moral stance. Ultimately that comes to a decision by the client, not the lawyer.’<sup>166</sup>

A second legal ethics approach is described by Parker and Evans as the *responsible lawyer* model.<sup>167</sup> Under this model, the lawyer’s duty as officer of the court and responsibility to pursue justice and maintain the integrity of the legal system overrides his duty to the client though the lawyer still advocates for his/her clients’ interests.<sup>168</sup> Unlike the adversarial model which seems to be client-centred, the responsible lawyer ethic is public interest-centred without fully compromising client interests. The responsible lawyer sees his/her role and the ‘practice of law as a “public profession” in which lawyers have a mediating function, between the client and the law.’<sup>169</sup> While responsible lawyers might put the duties to the legal system first, they, like adversarial advocates, do not consider personal morals relevant to their roles. Like the adversarial advocate, the responsible lawyer will look to the ethics

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<sup>166</sup> Simons, above n 13.

<sup>167</sup> Parker and Evans, above n 156, 24-27.

<sup>168</sup> Parker and Evans, above n 156, 24.

<sup>169</sup> Parker and Evans, above n 156, 26 (citing Robert Gordon, ‘Corporate Law Practice as a Public Calling’ (1990) 49 *Maryland Law Review* 255).

inherent in their role as officer of the court and in the law and attempt to ‘pursue justice according to the law, no more and no less’.<sup>170</sup> However, unlike the adversarial advocate, the responsible lawyer’s primary focus is not the client’s interests but the public interest and how the client can achieve his/her goals without violating the public interest and compromising the integrity of the legal system. In essence, the responsible lawyer puts the profession first rather than the client, a position advocated by many legal scholars.<sup>171</sup> In a best case scenario, the responsible lawyer acts as a ‘go between’ to help the individual and the state achieve a more harmonious balance in terms of the goals each strives to achieve in the legal system.<sup>172</sup> They accomplish this by ‘creatively combin[ing] technical skill, a sense of social and legal responsibility and the vigorous pursuit of clients’ interests’.<sup>173</sup> In the context of this thesis, presumably a lawyer acting under the ‘responsible lawyer’ model would not use deception given his/her strict adherence to the integrity of the profession and maintaining the public trust, something which would be compromised through the use of deception. The question arises as to what might happen when the duties to the profession collide with the interests of justice or the lawyer’s own moral code.

A more extreme version of the responsible lawyer model might be what D’Amato and Eberle call the *socialist model* of legal ethics.<sup>174</sup> The socialist model invokes the power of the state above client interests. Under the socialist model, the

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<sup>170</sup> Parker and Evans, above n 156, 26.

<sup>171</sup> Michael Davis, ‘Professionalism Means Putting Your Profession First’ (1988-1989) 2 *Georgetown Journal of Legal Ethics* 342.

<sup>172</sup> Parker and Evans, above n 156, 25.

<sup>173</sup> Parker and Evans, above n 156, 26.

<sup>174</sup> Anthony D’Amato and Edward J Eberle, ‘Three Models of Legal Ethics’ (1983) 27 *Saint Louis University Law Journal* 762, 770-772.

lawyer's duty as an agent of the state supersedes his or her duty to client.<sup>175</sup> While the lawyer does consider the client's interests worthy, these goals are only worthy to the extent that they are consistent with the state's goals. Clients are expected to conform to the law and lawyers are expected to assist clients to rehabilitate themselves from deviations to the contrary. In the socialist system of legal ethics, 'there is no division of duty between the judge, prosecutor, and defence counsel'.<sup>176</sup>

A third legal ethics approach described by Parker and Evans is the *moral activist* model, a term originally coined by Luban.<sup>177</sup> Moral activism is in stark contrast to both the adversarial advocate and responsible lawyer approaches. Moral activism combines mainstream consequentialist theory and a deontological theory of ethics as applied to legal practice.<sup>178</sup> Consequentialist theory is based on the notion that all actions have consequences. A deontological theory of ethics means that there is a moral obligation to carry out some acts regardless of how they might impact human happiness or serve the common good.<sup>179</sup> As described by Luban, the moral activist understands that he/she cannot hide behind the cloak of the lawyer's traditional role-morality principles of partisanship and non-accountability. Luban describes moral activism as follows:

Moral activism...involves law reform – explicitly putting one's *phronesis*, one's savvy, to work for the common weal

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<sup>175</sup> D'Amato and Eberle, above n 174, 770. This model is most prevalent in socialist countries such as China and Russia, where the interests of the state appear to supersede all other interests.

<sup>176</sup> D'Amato and Eberle, above n 174, 770 (citing Monroe H Freedman, *Lawyers' Ethics in an Adversary System* (1975) 2).

<sup>177</sup> See generally Luban, above n 157, xxii (discussing the morally activist lawyer and moral activism approach to legal ethics).

<sup>178</sup> Parker and Evans, above n 156, 23, 28; See also Luban, above n 157, xxii (discussing the morally activist lawyer and moral activism approach to legal ethics). Moral activism may also be referred to as 'public interest' lawyering.

<sup>179</sup> D'Amato and Eberle, above n 174, 772-773 (discussing deontological ethics and its leading founder, Immanuel Kant).

– and client counselling.<sup>180</sup> The morally activist lawyer shares and aims to share with her client responsibility for the ends she is promoting in her representation; she also cares more about the means used than the bare fact that they are legal. As a result, the moral activist will challenge her client if the representation seems to her morally unworthy; she may cajole or negotiate with the client to change the ends or means; she may find herself compelled to initiate action that the client will view as betrayal; and she will not fear to quit. She will have none of the principle of nonaccountability, and she sees severe limitations on what partisanship permits.<sup>181</sup>

Lawyers operating under a moral activist ethic see themselves as active players of the ‘opportunity in the law’<sup>182</sup> such that they ‘feel responsible for doing justice even if that involves changing or challenging the law and, from time to time, its practitioners.’<sup>183</sup> This is particularly the case where moral activists feel the client’s cause is just and such activism is warranted.<sup>184</sup> The advantages of the moral activist approach include the possibility that lawyers are engaged in work for social good such as in legal aid or pro bono work as well as working with poor clients. This approach also allows the lawyer to play an active role in their client’s representation rather than being just a ‘hired hand’. The disadvantages consist of situations where lawyers may subordinate the interests of their clients to larger causes or to deny representation to people and causes which do not reform the law or causes that the lawyer deems

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<sup>180</sup> See generally Luban, above n 157, 173.

<sup>181</sup> Luban, above n 157, xxii.

<sup>182</sup> Luban, above n 157, xxii (discussing a term coined by Louis Brandeis who argued that the ‘opportunity in the law’ consisted in acting as a ‘people’s lawyer’ who ‘would self-consciously promote unrepresented interests, both public and private, with the same devotion and intelligence that corporation lawyers offer their clients.’ *Ibid* at xxiii.); See also Louis D Brandeis, ‘The Opportunity in the Law’ (1905) 39 *American Law Review* 555, 559.

<sup>183</sup> Luban, above n 157, xxii.

<sup>184</sup> Parker and Evans, above n 156, 29.

unworthy. In that vein, moral activism may work against the traditional approach of allowing each client ‘their day in court’, metaphorically speaking.<sup>185</sup>

A fourth legal ethics approach described by Parker and Evans is the *ethics of care* model, or *relational lawyering* approach.<sup>186</sup> Under this approach, personal and relational ethics take precedence over rights-oriented approaches and social, professional, or political gains.<sup>187</sup> The ethics of care approach argues for the following:

Whereas the ethics of justice is founded on the idea that everyone should be treated equally, the ethics of care requires that no one should be hurt. Whereas the ethic of justice assumes that one can resolve moral dilemmas by abstract and universalistic moral reasoning, the ethic of care requires due attention to context and the specific circumstances of each moral dilemma.<sup>188</sup>

This approach appears to argue for a feminine-oriented ethics approach with the assumption that the current standard conception ethics model is more male-oriented. The ethics of care model is primarily based on the works of Carol Gilligan who believed that the current rights-oriented moral reasoning approach was developed primarily from the male point of view rather than the more female-oriented care-based ethics views.<sup>189</sup> While controversial, the ethics of care approach has been adopted as an alternative approach to legal practice ethics primarily because of its contextual style as well as the attempt to incorporate the ‘moral, emotional, and relational

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<sup>185</sup> Parker and Evans, above n 156, 30-31; Luban, above n 157, 174.

<sup>186</sup> Parker and Evans, above n 156, 23, 31.

<sup>187</sup> Ibid.

<sup>188</sup> Caroline Maughan and Julian Webb, *Lawyering Skills and the Legal Process* (1995) 36.

<sup>189</sup> Parker and Evans, above n 156, 23, 31 (citing Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (1982)).

dimensions of a problem into the legal solution.’<sup>190</sup> The controversial nature of this approach lies in its strength as well as its weakness; a contextual style of ethics which allows for situation-based solutions but creates difficulty in limiting the possibility of developing a model of legal ethics that can be replicated and consistently used in the context of legal ethics issues. This contextual approach can be likened to what some scholars call situation ethics,<sup>191</sup> described as an ethic which holds that ‘both moral and legal rules are only relatively obliging and valid. Their claim upon us depends extrinsically upon variable circumstances’.<sup>192</sup>

The ethics of care has influenced legal practice in several ways: 1) by encouraging lawyers to use a more holistic approach to resolving clients’ problems; 2) by encouraging a more participatory approach to lawyering through greater dialogue between lawyer and client as well as more in-depth dialogue beyond the ordinary ‘legal issue’ that the client is facing; and 3) by allowing lawyers and clients to see each other as ordinary people with relationships worthy of preserving and thus encouraging more non-adversarial approaches to resolving disputes.<sup>193</sup>

While the ethics of care approach may seem beneficial, justifying the incorporation of a personal ethic into the legal ethics dilemma would seem problematic because personal ethics vary so greatly and because there might be a

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<sup>190</sup> Thomas L Shaffer, *On Being a Christian and a Lawyer: Law for the Innocent* (1981); Thomas L Shaffer and Robert F Cochran, *Lawyers, Clients and Moral Responsibility* (1994); Parker and Evans, above n 156, 32.

<sup>191</sup> William H Simon, *The Practice of Justice: A Theory of Lawyer Ethics* (1998) 138; Thurman, above n 148, 103.

<sup>192</sup> Joseph Fletcher, ‘Situation Ethics, Law and Watergate’ (1975-1976) 6 *Cumberland Law Review* 35, 36. See also Simon, above n 191, 138 (discussing the nature of contextual judgement of lawyers and proposing a lawyer ethic that is more contextual in nature and based on the justice-serving goals of the legal system rather than the current rules-based approach or personal morality). Note that while Parker and Evans would include personal morality as a guide post in the ethics of care model, it appears that Simon would argue for going beyond personal morals to focus on the overarching intentions of the justice system.

<sup>193</sup> Parker and Evans, above n 156, 33-34.

danger of losing the overarching societal values that appear to be embodied into a legal justice system. However, this is the embodiment of the ethics of care – a greater concern for the client’s deep-seated interests, the network of relationships in which the client is engaged, and a greater interest in personal change (of the client) rather than social change.<sup>194</sup>

In addition to the primary legal ethics models discussed above, there have been other suggestions for adopting alternative legal ethics models, including the deontological model based on Immanuel Kant’s theories as proposed by D’Amato and Eberle<sup>195</sup> as well as a contextual ethics model based on situation ethics as proposed by W D Ross.<sup>196</sup> Finally, William H Simon has proposed a lawyer ethics model based on contextualism as well as a lawyer disciplinary model based on the torts compensation system.<sup>197</sup> To date these have not had significant impact on the current legal ethics models used and thus are not discussed in detail here.

In conclusion, while there appears to be some general consensus that the adversarial ethics model is the most predominant model in use today, the other legal ethics models may also be used in various degrees by various lawyers. To some extent, this is expected of a self-regulated profession where legal jurisdictions are allowed to adopt certain jurisdiction-specific ethics codes and where lawyers often act as agents for clients. At the same time, the use of multiple and potentially conflicting

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<sup>194</sup> Parker and Evans, above n 156, 35-36.

<sup>195</sup> D’Amato and Eberle, above n 174, 772-773

<sup>196</sup> See generally D’Amato and Eberle, above n 174, 772-774. See also W D Ross, *The Right and the Good* (1930) (arguing for ‘right’ action rather than ‘good’ action such that ‘[a]n act is not right because it, being one thing, produces good results different from itself; it is right because it is itself the production of a certain state of affairs. Such production is right in itself, apart from any consequence.’); W D Ross, *The Foundations of Ethics* (1939).

<sup>197</sup> Simon, above n 191. Simon’s contextualist approach to legal ethics theory is treated briefly Chapter 7.

legal ethics model of a given jurisdiction is highly problematic for a profession as a whole.

In the context of this thesis and the use of deception in negotiation, it means that there is greater potential for variability in lawyer conduct<sup>198</sup> depending on the legal ethics theory used such that some lawyers may justify deceptive conduct and get away with it while others may be unduly punished for acting in a similar manner. The potential inconsistency in behaviour and enforcement under variable ethics codes is likely to only add to the public's ambivalence towards the legal profession.<sup>199</sup> Given these concerns, care must be taken in adopting a specific model because 'ethics is precarious if it is dependent on a contingent outcome of an entirely selfish consequentialist calculus'.<sup>200</sup> This is even more so when lawyers negotiate and are part of a negotiation process that has its own history and theories of bargaining ethics.

#### **2.3.4 Theories of Negotiation and Negotiation Process**

The preceding section focused on the various theories of legal ethics and how they may influence a lawyer's behaviour in the course of practice. The focus of this section is on the theories of negotiation and the negotiation process.<sup>201</sup> As the central focus of this thesis is on the use of deception in negotiation, it is important to understand the underlying tenets of the negotiation process and how negotiation theory and principles affect a lawyer's ability to negotiate while still adhering to the legal ethics codes of the profession. This section discusses four primary negotiation

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<sup>198</sup> See Chapter 7, Section 7.7 (Implementing the Proposed Policy Reform Proposals) for a discussion on the impact of variability of conduct on the lawyer and the profession.

<sup>199</sup> See Chapter 6, Section 6.5 (Consumer Studies of the Legal Profession are the Sting in the Tail) for a discussion of consumer studies and public perceptions of lawyers and the legal profession.

<sup>200</sup> Stephen Parker and Charles Sampford (eds) *Legal Ethics and Legal Practice: Contemporary Issues* (1995) 55; See also C A J Coady and Charles J G Sampford (eds), *Business, Ethics, and the Law* (1993) 6.

<sup>201</sup> See Chapter 1, Section 1.7 (Definition of Key Terms) for a definition of 'negotiation' as used in this thesis.



theories starting with the communitarian bargaining theory. This is followed by a section on theories of negotiation ethics so as to distinguish between ethics used in the legal context as compared with ethics proposed for the negotiation process.

A legal bargaining theory, called the ‘communitarian bargaining theory’ emerged in the late 1970s<sup>202</sup> with the *meta* argument<sup>203</sup> as a central mechanism. The communitarian bargaining theory has been described as perhaps ‘the most important development in the legal bargaining literature in the last twenty years.’<sup>204</sup>

Communitarian bargaining theory is relevant to this thesis because it helps establish the distinction between negotiation for the purpose of a social good (non-legal) and negotiation for the purpose of resolving an individual’s claim to something (legal). Scholars such as Professor Condlin describe the communitarian approach to legal bargaining as grounded on ‘methodological claims about the importance of tradition and social context for moral and political reasoning, ontological or metaphysical claims about the social nature of the self and normative claims about the value of community.’<sup>205</sup> Further, a communitarian approach is ‘characterized principally by a commitment to resolving disputes from the perspective of what is

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<sup>202</sup> Robert J Condlin, Bargaining with a Hugger: The Weaknesses and Limitations of a Communitarian Conception of Legal Dispute Bargaining, Or Why Can’t All Just Get Along (March 25, 2006) 1, n 3. bpress Legal Series. Working Paper 1194. <<http://law.bepress.com/expresso/eps/1194>> at 9 August 2010 (crediting the work of Gerald R. Williams with the introduction of the communitarian theory of bargaining in legal literature with the publication of his book *Legal Negotiation and Settlement*. See generally Gerald R Williams, *Legal Negotiation and Settlement* (1983). Based on survey research conducted in the late 1970s, Williams argued that ‘the most effective [legal] negotiators are characterized by positive social traits and attitudes and by the use of more open, cooperative and friendly negotiating strategies.’ (See eg, Gerald R Williams et al., ‘Effectiveness in Legal Negotiation’ in Gordon Bermant et al. (eds) *Psychology and the Law* (1976) 113.

<sup>203</sup> Robert J Condlin, ‘Every Day and in Every Way, We are All Becoming Meta and Meta: Or How Communitarian Bargaining Theory Conquered the World (of Bargaining Theory)’ (2008) 23 *Ohio State Journal on Dispute Resolution* 2.

<sup>204</sup> Condlin, above n 203, 2, n 9 (citing Carrie Menkel-Meadow, Why Hasn’t the World Gotten to Yes? An Appreciation and Some Reflections (2006) 22 *Negotiation Journal* 485, 485-487 (stating that communitarian bargaining has ‘revolutionized how negotiation is taught in law schools’).

<sup>205</sup> Condlin, above n 202, 1, n 3. See also *Communitarianism* <<http://plato.stanford.edu/entries/communitarianism>> at 9 August 2010.

good for the social group, on the basis of consensus norms, rather than from the perspective of what is good for the individual negotiator, on the basis of a rights claim.<sup>206</sup>

Clients and lawyers using this approach allegedly ‘share information about themselves and their situations candidly and honestly, construct agreements from the perspective of their common interests and resolve differences according to objectively derived and jointly agreed upon substantive standards.’<sup>207</sup> This communitarian approach results in a bargaining model where self-interest, a central motive of traditional bargaining methods is ‘not naked, force is not brutish, entitlement claims are not legalistic and everyone acts in the spirit and to the limits, of their social potential.’<sup>208</sup>

A central mechanism of communitarian bargaining theory is the *meta* argument. According to Condlin, the *meta* argument ‘goes beyond the frame of reference of another person to a conversation to trump that person’s views with those of a higher order...and attempts to resolve disagreement from a ‘higher’ vantage point, one that takes more relevant data and ideas into account.’<sup>209</sup> In other words, instead of focusing on an individual’s specific point of view, the *meta* argument looks at the bigger picture and attempts to dispose of opposing contentions by interjecting a different perspective, more information, or other higher view to resolve the disagreement. This aspect of communitarian bargaining is especially relevant to the

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<sup>206</sup> Condlin, above n 202, 1, n 3.

<sup>207</sup> Condlin, above n 202, 1-2

<sup>208</sup> Condlin, above n 202, 3. Condlin actually disputes these purported benefits of communitarian bargaining as being too idealistic and not grounded in reality, as ‘more mythic than data-based’ and ‘appealing to those who have little direct experience with bargaining practice itself’ or those who do have practice but have failed and so ‘now want to change the ground rules so they will do better in the future’. (Ibid at 4).

<sup>209</sup> Condlin, above n 203, 1.

focus of this thesis because the *meta* argument would presumably preclude the use of deception in negotiation as it would not be conducive to the goal of resolving disagreement and achieving agreement.

Proponents of communitarian bargaining seem to consider it a more civilized approach to bargaining as compared with adversarial bargaining, which is sometimes described as ‘representing a refusal to bargain, a process of presenting “an unbreachable defensive position” which an opponent cannot dislodge or defeat...by any means of persuasion based on the merits.’<sup>210</sup> Murray describes adversarial bargainers as those who ‘coerce’, ‘deceive’, and ‘manipulate’<sup>211</sup> opponents, have total disregard for the costs or concerns of others and ignore concerns of ‘fairness, wisdom, durability, and efficiency’.<sup>212</sup>

Conversely, opponents consider the communitarian approach to bargaining as not grounded in reality and based on ‘myth’ rather than the real-life aspects of bargaining. Opponents to communitarian bargaining believe the adversarial bargaining approach represents the way legal bargaining *actually* takes place and argue that, in the end, both lawyers and their clients are better off pursuing individual rather than communal goals and are likely to do better at the bargaining table if ‘they are secretive as well as open, argumentative as well as accommodating, suspicious as well as trusting, stubborn as well as flexible, and combative as well as cordial’,<sup>213</sup> thus dismissing a solely communitarian bargaining approach as ‘self-defeating’ in the context of legal bargaining.

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<sup>210</sup> Condlin, above n 203, 10 (citing John S Murray, ‘Understanding Competing Theories of Negotiation’ (1986) 2 *Negotiation Journal* 179, 183.

<sup>211</sup> Murray, above n 210, 183.

<sup>212</sup> Ibid.

<sup>213</sup> Condlin, above n 202, 6.

Over the last two decades, three other theoretical frameworks have emerged as being dominant with respect to the theory of negotiation and, and more specifically, the legal negotiation process.<sup>214</sup> These key developments are important to understanding how traditional negotiation as practiced by non-lawyers has evolved into negotiation as practiced by lawyers and the ethics that might guide the lawyer's conduct in negotiations depending on the relevant theory of negotiation, including whether the use of deception is permissible.

First, in 1984, Menkel-Meadow proposed that all negotiations can be classified according to two categories: 'problem-solving' or 'adversarial'.<sup>215</sup> Adversarial negotiation, considered a traditional model of negotiations, has also been called zero-sum bargaining, distributing bargaining, and value claiming.<sup>216</sup> In the context of this thesis, a lawyer who operates under an adversarial advocate model of legal ethics would presumably use adversarial negotiation practices as the norm since the ethics align with practice.

As defined by Menkel-Meadow, the problem-solving model is based on 'finding solutions to the parties' set of underlying interests'<sup>217</sup> rather than focusing solely on strategies and tactics. The problem-solving approach to negotiations has been classified as a win-win, integrative bargaining or value creating model whose focus is on finding the underlying needs and interests of the parties in order to come to a solution that is mutually beneficial without unnecessary compromise. Menkel-

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<sup>214</sup> Korobkin, above n 37, 1 (defining negotiation as 'an interactive communication process by which two or more parties who lack identical interests attempt to find a way to coordinate their behaviour or allocate scarce resources in a way that will make them better off than they could be if they were to act alone.')

<sup>215</sup> Korobkin, above n 37, 17-21; See also Carrie Menkel-Meadow, 'Toward Another View of Legal Negotiation: The Structure of Problem-Solving' (1984) 31 *University of California Los Angeles Law Review* 754, 765-772, 780, 800-805.

<sup>216</sup> See, eg, Menkel-Meadow, above n 215, 764-794 (discussing the adversarial model).

<sup>217</sup> Menkel-Meadow, above n 215, 794; See also Fisher and Ury, above n 11.

Meadows argues that because lawyers bargain ‘in the shadow of the law’, legal negotiators tend to operate from the ‘adversarial’ negotiations paradigm with a focus on maximizing victory,<sup>218</sup> even if this might mean crossing ethical boundaries.

Second, in 1993, Mnookin proposed that negotiation is really about how parties overcome obstacles in order to reach mutually advantageous solutions.<sup>219</sup> Therefore, the essence of negotiations is the factors that impede the ability of negotiating parties to reach agreement on a solution. Mnookin identified at least three categories of barriers: strategic, cognitive, and the principle/agent problem.<sup>220</sup> Presumably, resolution to each of these types of barriers is not only the goal of negotiations but a mark of whether a negotiation may be considered ‘successful’.<sup>221</sup>

Finally, in 2000, Korobkin introduced a fourth primary theoretical perspective of negotiation. Korobkin argued for a positive theory of negotiations, one in which all negotiations can be understood in terms of ‘zone definition’ and ‘surplus allocation’.<sup>222</sup> According to Korobkin, a key aspect of any negotiation is determining the ‘bargaining zone’, defined as ‘the space below a buyer’s reservation price but above the seller’s reservation price’.<sup>223</sup> Within the bargaining zone, a party’s reservation price is ‘the most...[a party]...will pay to obtain a valuable item through negotiation or the least that...[a party]...will accept to give up a valuable item’.<sup>224</sup> According to Korobkin, all negotiations entail defining the range of the bargaining

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<sup>218</sup> Menkel-Meadow, above n 215, 765-772, 780, 800-805. See also Korobkin, above n 37, 18.

<sup>219</sup> Korobkin, above n 37, 26-29; See also Robert H Mnookin, ‘Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict’ (1993) 8 *Ohio State Journal of Dispute Resolution* 235, 235-245.

<sup>220</sup> Korobkin, above n 37, 26-29; See also Mnookin, above n 219, 235-245.

<sup>221</sup> See Section 2.2.4 (Definition of ‘Success’ in Negotiation) for an in-depth discussion.

<sup>222</sup> Korobkin, above n 37, 21-25; See also Korobkin, above n 32, 1791-1792, 1799-1812, 1816-1831.

<sup>223</sup> Korobkin, above n 37, 41- 42.

<sup>224</sup> Ibid. A reservation price is also known as the reservation point.

zone ('zone definition'), determining the 'cooperative surplus',<sup>225</sup> and then allocating that surplus amongst the bargaining parties. An important aspect of this theory is Korobkin's recognition of the economic aspect of negotiations (zone definition) entwined with the more social aspects (surplus allocation), where issues of procedural fairness, and perceptions of ethics come into play.<sup>226</sup>

The preceding section described four main theoretical perspectives on negotiation and the negotiation process. In the context of this thesis, the theoretical perspectives of the negotiation process provide a foundation to realising that negotiation appears to be a distinct process composed of certain expectations, behaviours, steps, and strategies. Furthermore, these theories of the negotiation process impact the kinds of ethics a lawyer might use during negotiation and the resulting behaviours because just as theories of law intersect with theories of legal ethics, so do theories of negotiation intersect with theories of negotiation ethics. This will be important in light of the policy reform proposals discussed in Chapter 7.

### **2.3.5 Theories of Negotiation Ethics**

In contrast or perhaps complementary to the generally accepted legal ethics theories discussed in section 2.3.3, Shell, a notable dispute resolution scholar, argues for three slightly different schools of ethics as they pertain specifically to bargaining (negotiations) and its effects on deceptive practices within negotiations.<sup>227</sup> In the context of this thesis, it is important to note that in the absence of guidelines to the

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<sup>225</sup> Korobkin, above n 37, 41- 42 (defining 'cooperative surplus' as '...the breadth of the bargaining zone – that is, the distance between the two parties' reservation prices...or 'joint value' that the parties can create by reaching agreement').

<sup>226</sup> Korobkin, above n 37, 22, 24-25.

<sup>227</sup> G Richard Shell, 'Bargaining with the Devil Without Losing Your Soul' in Carrie Menkel-Meadow and Michael Wheeler (eds) *What's Fair: Ethics for Negotiators* (2004) 65-69.

contrary, lawyers may use one or more of these models to guide negotiation behaviour regardless of whether any might violate the legal ethics rules.

According to Shell, the first negotiation ethic is the '*poker*' school of bargaining, which holds that negotiations are like a poker game and, as such, must be played by the rules of the game. In this bargaining ethics scenario, lying is simply like a poker chip, bluffing is allowed (even expected) but 'hiding cards or reneging on one's bets is not allowed.'<sup>228</sup> The '*poker*' school of bargaining closely relates to the 'end-results' social ethics model discussed in section 2.3.2.3 above. The '*poker game*' analogy is also most commonly used by the adversarial advocate theory of legal ethics.

The second negotiation ethics model is the *idealist* school, which argues that bargaining is an inherent part of life. The ethics used in one's personal life should be the same ethics used in negotiations.<sup>229</sup> It follows that if, in your personal life, you do not condone lying, then you should not lie in your professional negotiations. The idealist school of bargaining ethics does not exclude lying, especially in certain circumstances such as protecting someone's feelings. Because this model more closely integrates religion and philosophy, it appears to be a combination of the social contract and personalistic social ethics models discussed in section 2.3.2.3 above.

Finally, the third bargaining ethics school is the *pragmatist* approach. This approach argues for acting based on what is practical, realistic, or sensible given the circumstances. In regards to lying, the pragmatist recognizes that deception is part of

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<sup>228</sup> Cindi Fazzi, 'Book Review: *What's Fair: Ethics for Negotiators*, edited by Carrie Menkel-Meadows and Michael Wheeler' (2005) 60-JUL *Dispute Resolution Journal* 89, 89.

<sup>229</sup> Shell, above n 227, 65-69.

negotiations but would rather not use it given the long-term costs of using such a tactic, such as relational, reputation or transaction costs.<sup>230</sup>

While Shell's three bargaining ethics models assume deception as part of the negotiation process, bargaining ethicist Norton believes fully understanding the bargaining process is essential to having the proper ethics in which to engage in bargaining. In effect, Norton discounts the existence of deception in negotiation and argues that truthfulness and fairness are vital to negotiations<sup>231</sup> and set the baseline for reaching durable agreements by imposing a minimal, though not always aspirational standard of bargaining ethics. Norton contends that 'ethical clarity is taxed in a process in which both truthfulness and deception have standing.'<sup>232</sup> While Shell believes Shell's three bargaining ethics models are sufficient to describe negotiation ethics, Norton argues that there are four aspirational bargaining ethics models. These models are discussed briefly below.

According to Norton, the first aspirational bargaining ethics model is *universalism*, whose most ardent supporter may be considered to be Judge Alvin Rubin.<sup>233</sup> Universalism may also correlate to Shell's idealist model of bargaining ethics discussed above. Universalism proposes to push negotiation ethics towards universal ethical norms with greater priority on societal interests over considerations of self-interest<sup>234</sup> as the 'center of gravity in negotiations'.<sup>235</sup> Universalism rejects 'special' rules that may apply to an individual because of his or her special role or cultural process. Universalists such as Judge Rubin argue that because lawyers serve

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<sup>230</sup> Ibid.

<sup>231</sup> Norton, above n 19, 271.

<sup>232</sup> Norton, above n 19, 274.

<sup>233</sup> See, eg, Rubin, above n 69, 577; See also Wetlaufer, above n 31, 1219.

<sup>234</sup> Norton, above n 19, 274.

<sup>235</sup> Ibid.



society and not just their clients in the ‘just determination of disputes’, lawyers have an affirmative duty of candour, including voluntary disclosure during negotiations.<sup>236</sup>

Judge Rubin places a higher value on honesty as a positive value and one which implies ‘not only telling [the] literal truth but also disclosing the whole truth.’<sup>237</sup>

Universalist bargaining ethics, however, appears to sharply contradict the central paradigms of negotiation, especially those of legal negotiation. First, a universalist ethic presupposes and would ask lawyers to interject societal interests into a process that is generally ‘intrinsically individualistic’ given the adversarial nature of the legal system.<sup>238</sup> Second, a universalist bargaining ethic does not appear to give sufficient weight to both the partisan nature of the adversarial system or the partisan interests inherent in real negotiations, especially those involving lawyers.<sup>239</sup> While truth and fairness could be said to transcend partisan/individualistic concerns, the reality of most negotiations appears to be such that a universalist duty of candour would be problematic given that ‘available evidence confirms the notion that truthfulness is a particular source of ethical tension in negotiations.’<sup>240</sup> Nevertheless, aspirational notions of truthfulness and fairness are favoured by many and may still be achieved.

A second aspirational bargaining ethics model, in sharp contrast to universalism is the traditionalist view, which coexists with the classic bargaining process of offers and counteroffers. Traditionalism could be correlated to Shell’s poker school of bargaining ethics and Parker and Evans’ adversarial advocate legal

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<sup>236</sup> Norton, above n 19, 276. (discussing Rubin’s universalist views).

<sup>237</sup> Rubin, above n 69, 582, 589-591.

<sup>238</sup> Norton, above n 19, 277.

<sup>239</sup> Ibid.

<sup>240</sup> Norton, above n 19, 274.

ethics model discussed earlier. *Traditionalism* is based on zero-sum self-interest.<sup>241</sup> Zero-sum bargaining is also referred to as distributive bargaining, win-lose, or lose-win.<sup>242</sup>

Traditionalism is ‘the dominant ideology of the legal profession.’<sup>243</sup> As such, traditionalists draw from the ethics of the adversary system. This is most commonly expressed ‘in the oppositional stance assumed by lawyers with clients against others with adverse interests and is justified by intense loyalty in order to adequately represent a client.’<sup>244</sup> Traditionalists, such as James White,<sup>245</sup> appear to specifically reject universalism and place partisan, individualistic, and self-interest concerns well above societal interest. In fact, traditionalists would push bargaining ethics to the outer limits to the point where a lawyer might ‘use a lower standard than he would if he were acting for himself, and lower too, than any standard his client himself would be willing to act on, lower, in fact, than anyone on his own.’<sup>246</sup> As Curtis explains, the traditionalist lawyer’s primary concern is loyalty to the client and this higher responsibility, one that is the foundation of zealous representation of the client as well as the traditional foundation of the adversarial system, ‘allows the lawyer to lie for the client when he could not justify lying for himself.’<sup>247</sup> Without this chief asset of the profession, in other words, the ‘freedom from the strict bonds of veracity’,<sup>248</sup> lawyers

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<sup>241</sup> Norton, above n 19, 277.

<sup>242</sup> See, eg, Fisher and Ury, above n 11 (discussing the distinctions on various ways to conduct distributive bargaining).

<sup>243</sup> Norton, above n 19, 277.

<sup>244</sup> Ibid.

<sup>245</sup> See, eg, White, above n 60, 929.

<sup>246</sup> Charles P Curtis, ‘The Ethics of Advocacy’ (1951) 4 *Stanford Law Review* 3, 3-23.

<sup>247</sup> Norton, above n 19, 277. Note that in some jurisdictions and perhaps in some cultures, explicit or implicit rules specifically allow such deception on behalf from the client, including duties of confidentiality and non-disclosure of certain information as part of attorney-client privilege; Curtis, above n 246, 9 (‘... one of the functions of a lawyer is to lie for his client ... He is required to make statements as well as arguments which he does not believe in.’)

<sup>248</sup> Curtis, above n 246, 9.

who espouse to this traditionalist view would argue that they are not able to effectively serve their clients who are, in effect, members of society. A traditionalist view of bargaining ethics is intricately woven into the fabric of the traditional bargaining ethics of the adversary system and would potentially require a massive overhaul to impose an alternative bargaining ethic.

A third aspirational bargaining ethics model is the *relativist ethic*. The relativist ethic may provide a means of departure from a strictly universalist or traditional bargaining ethic because instead of applying strict rules across all negotiations (universalist ethic) or adopting the majority view of bargaining (traditional ethic), the relativist ethic argues for bargaining rules relative to the situation or context within which bargaining occurs.

For example, Norton argues that the difference between litigation and non-litigation means of resolving disputes may provide an avenue for a specialist ethic, a bargaining ethic that is relative to the process used (e.g., whether it required courtroom advocacy, a judge, or simply a non-legal neutral).<sup>249</sup> While a relativist bargaining ethic would seek to maintain the benefits of both universalism and traditionalism, it does not appear clear whether such divisions would create more confusion or provide ethical clarity. It would seem that a relativist ethic would leave ethics more diluted and less cohesive so as to increase the chances of deception, albeit in perhaps more subtle ways.

Pragmatist ethics is a final aspirational bargaining ethic, one which Shell also supports and recognises.<sup>250</sup> *Pragmatism* eschews the theoretical underpinnings of universalism and traditionalism. This model advocates for bargaining experience as

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<sup>249</sup> Norton, above n 19, 279.

<sup>250</sup> Shell, above n 227, 65-69.

the primary basis for a bargaining ethic.<sup>251</sup> It is ‘the range of acceptable agreements for experienced negotiators in the field in question.’<sup>252</sup> A pragmatist would use a different bargaining ethic depending on the skill and sophistication of each opponent as well as the circumstances surrounding the negotiation.

Context, as in the negotiation context, is a determinative factor in deciding which ethic is appropriate. Pragmatism does not automatically defer to the societal ethical norms (universalism) or adopt a classic adversarial stance (traditionalism) or even conform to a bargaining ethic relative to a person’s position or cultural process (relativism). Pragmatism appears to favour using the bargaining experience, which may include widespread ethical practices or not, as the basis for determining which ethical standard is appropriate.<sup>253</sup> As such, pragmatism may correlate to the responsible lawyer legal ethics model discussed earlier as both seek to make the best decisions without compromising personal or professional integrity and reputation. While functional and perhaps even common practice among lawyers, pragmatism as a bargaining ethic raises several concerns.

First, pragmatism assumes that what is common practice is an appropriate ethical standard. The appropriateness of the ethical standard would likely be measured at a higher level than just one given situation or step in the negotiation. The standard may be the prevailing society’s ethical standard, likely higher than that of a given negotiation context. Second, pragmatism has ‘serious methodological problems.’<sup>254</sup> In essence, as Norton questions, without data or some means of

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<sup>251</sup> Norton, above n 19, 279.

<sup>252</sup> Lowenthal, above n 28, 411.

<sup>253</sup> Norton, above n 19, 279.

<sup>254</sup> Norton, above n 19, 280.

identifying and evaluating practices, how does one assess the extent to which a deviation from the truthfulness and fairness baseline is unethical?<sup>255</sup>

In brief, these various bargaining ethics models play a part in any negotiation. The bargaining ethics of the legal negotiator may conflict with the society's ethical norms, the client's ethics or even the ethics of a mediator, if one is employed to assist in the negotiations. Knowledge and sensitivity to such conflicts may increase the chances that a lawyer can properly manage potentially deceptive practices, especially in negotiation. However, even sensitivity to the ethics in the context of a negotiation may not be sufficient if certain theories of deception and decision-making hold true during the negotiation. These theories of deception and decision-making theories, which may affect the extent to which deception is used in negotiation, are discussed in the next two sections.

### **2.3.6 Theories of Deception and Lies in Practice**

As discussed in the preceding sections, the prevailing legal ethics codes as well as the prevailing negotiation theory in the legal jurisdiction may heavily influence whether deception in negotiation is permissible. In addition, a lawyer's own view of the nature and impact of deception may affect the decision to use deception in negotiation, whether personally or professionally. The purpose of this section is to provide a theoretical perspective on deception and lies in practice so as to better inform the results of the research questions as discussed in Chapters 3, 4, and 6 and to provide a foundation for understanding the policy reform recommendations presented in Chapter 7.

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<sup>255</sup> Ibid. Note that this problem would likely occur under any of the models simply because 'truthfulness' and 'fairness' are not expressly identified criteria of measuring or evaluating negotiation 'success' or outcome.

Whether deception is a necessary evil appears to depend ‘on the eye of the beholder’. Theoretically, there appear to be two distinct views on deception. The *deontological view* of lying states that lying is intrinsically wrong, always has a negative value, regardless of reason, and should be prohibited.<sup>256</sup> As discussed earlier, deontologists consider lying to be inherently wrong because of the following primary reasons: 1) lying ‘violates contractual commitments between two interlocutors who assume by default that the other person always tells the truth’; 2) lying ‘limits the lie-recipient’s freedom of choice and leads the person to make an uninformed decision’; and 3) lying ‘creates an internal conflict on the part of the lie-teller and cognitive dissonance in the lie-teller’s belief system, which can be hazardous to the lie-teller’s psychological well-being’.<sup>257</sup>

In sharp contrast, proponents of the *social-conventional view* of lying argue that lying has inconstant values and may be considered right or wrong depending on social and cultural conventions.<sup>258</sup> In some socio-cultural conventions, lying may be considered positive and sanctioned while in others, lying is prohibited and has a negative value.<sup>259</sup> In addition, social-culturalists discount the deontological perspective of lying as wrong, suggesting instead that the deontological view reflects only the Western, individualist view and does not take into account cultures (e.g. Asian),<sup>260</sup> where ‘concerns for individual rights to information, freedom of choice,

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<sup>256</sup> This is the view of someone like Emmanuel Kant. See also Bok, above n 33, 26; J Krupfer, ‘The moral presumption against lying’ (1982) 36 *Review of Metaphysics* 103–126.

<sup>257</sup> Lee et al (2001), above n 72, 527.

<sup>258</sup> Lee et al (2001), above n 72, 526-527 (citing E Ochs Keenan, ‘On the universality of conversational implicatures’ (1976) 5 *Language in Society* 67-80).

<sup>259</sup> Lee et al (2001), above n 72, 526-527 (citing Harry C Triandis, *Individualism and collectivism* (1995). Triandis’ work on cross-cultural differences with respect to a variety of factors is well-respected and well-referenced in the field.

<sup>260</sup> Note: The use of ‘Western’ and ‘Asian’ terms is not meant to stereotype countries or people. These terms, as used here, indicate a common view that some countries are more concerned about

and mental health are not necessarily critical factors for deciding the moral implications of lying'.<sup>261</sup> In non-Western cultures, Lee et al's research suggests that 'concerns for collectivity, and sometime divine forces are important determinants of whether lying is right or wrong'.<sup>262</sup>

### **2.3.7 Decision-Making Theories Affecting Legal Negotiation**

The legal system's foundation is a system of rules<sup>263</sup> by which scholars, legislators, judges, and regulators attempt to balance the need to discourage undesirable behaviours while encouraging other more favourable behaviours. In so doing, law and economics scholars have referred to certain decision-making theories to better understand human behaviour and how decisions are made in the context of legal negotiation. While these theories may not be widely used, they do offer insights that are useful in answering the research questions at hand. For example, one of the key skills of a lawyer is risk management, both for the client and the lawyer. Given both the perceived benefits and harms caused by deception in negotiation,<sup>264</sup> it could be argued that the decision to be deceptive is a risky decision.

One way in which these decision-making theories are useful is in understanding how a lawyer might evaluate the risk involved in using deception in

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individualistic views and priorities ('western') versus group or collectivist views ('asian') regarding the use of lying or deception and the factors that influence whether it is right or wrong. For the lawyer acting as negotiator, the key question is whether it is permissible for a lawyer, as an officer of the court and representative of the legal system, to lie, regardless of whether in a negotiation or otherwise. Lying in negotiation seems permissible precisely because it is such an acceptable part of traditional negotiations.

<sup>261</sup> Lee et al (2001), above n 72, 527.

<sup>262</sup> Lee et al (2001), above n 72, 527; See also K Lee and H Ross, 'The concept of lying in adolescents and young adults' (1997) 43 *Merrill-Palmer Quarterly* 255-270; E E Sweetser, 'The definition of lie; An examination of the folk models underlying a semantic prototype' in D Holland (ed) *Cultural models in language and thought* (1987) 43-66 (Sweetser's research pointed to lying as a social-cognitive construct influenced by social conventions).

<sup>263</sup> Note: By 'rules', I mean legislation, legal principles derived from case law, codes of conduct, court rules and any similar prescriptions, which deem to regulate conduct and punish for violation thereof.

<sup>264</sup> See Chapter 2, Section 2.2.2 (Deception as a Negotiation Strategy) for a detailed discussion of harms and perceived benefits of using deception as a negotiation strategy).

negotiation. In addition, by understanding how lawyers and clients make decisions when confronted with risky behaviour, educators and policy makers can better guide behaviour or develop policies that take into account certain behavioural expectations, resulting in greater success in developing, implementing, and measuring policy outcomes. The purpose of this section is to discuss these key decision-making theories with an eye towards how these theories may affect the implementation of the policy reform proposals outlined in Chapter 7.

One of the chief decision-making theories long used by law and economic scholars is ‘rational choice theory’ or ‘expected utility theory’.<sup>265</sup> *Rational choice theory* is based on a series of logical axioms and argues that ‘people make outcome maximizing decisions’.<sup>266</sup> In other words, people will make those decisions which maximize their own self-interests. This theory is consistent with basic human nature that tends to focus on self-interests. However, rational choice theory began to fall into disfavour as legal scholars recognised that there was ‘too much credible experimental evidence that individuals frequently acted in ways that are incompatible with the assumptions’<sup>267</sup> proposed by rational choice theory. In other words, individuals do not always make rational choices. Out of a critical analysis of the rational choice theory and a greater understanding of human decision-making, a new theory, called

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<sup>265</sup> Daniel Kahneman and Amos Tversky, ‘Prospect Theory: An Analysis of Decision Under Risk’ (1979) 47(2) *Econometrica* 263-291; See also Chris Guthrie, ‘Prospect Theory, Risk Preference, and the Law’ (2003) 97 *Northwestern University Law Review* 1115, 1115-1119; Thomas S Ulen, ‘Firmly Grounded: Economics in the Future of the Law’ (1977) *Wisconsin Law Review* 433, 436 (‘The single most important contribution that law and economics has made to the law is the use of a cogent theory of human decision-making [rational choice theory] to examine how people are likely to respond to legal rules.’)

<sup>266</sup> Guthrie, above n 265, 1115.

<sup>267</sup> Russell B Korobkin and Thomas S Ulen, ‘Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics’ (2000) 88 *California Law Review* 1051, 1055.



‘prospect theory’, emerged in the wake of evidence from the fields of behavioural law and economics as well as law and psychology.

In 1979, cognitive psychologist and Nobel laureate Daniel Kahneman and cognitive psychologist Amos Tversky developed prospect theory through an empirical study involving students and university faculty in response to several hypothetical choice questions.<sup>268</sup> There are four primary components of prospect theory, which argues that people do, in certain circumstances, make risky or uncertain decisions.<sup>269</sup> These four primary components, discussed in detail below, include: 1) the framing of ordinary gains and losses; 2) the framing of low-probability gains and losses; 3) the perception of loss aversion; and 4) overvaluing the sense of certainty.

The proposition of prospect theory counters rational choice theory and the assumption that people generally assume a position of ‘either risk neutrality or risk aversion in the face of both gains and losses.’<sup>270</sup> In other words, rational choice theory says people never make risky choices or risky decisions, whether faced with a probability of achieving gains or incurring losses. This seems to be based on an *objective* (rational) assessment of their expected loss in comparison to their perceived total wealth at the time of making the decision. In contrast, prospect theory holds that people will make risky or uncertain decisions regarding gains or losses in one of four particular ways, as discussed below. Decisions under prospect theory tend to be

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<sup>268</sup> See generally, Kahneman and Tversky, above n 265, 264-268; See also Avnita Lakhani, ‘The Fog Has Not Lifted – Section 198J of the NSW Legal Profession Act in Light of Acceptable Negotiation Theory and Principles’ (2006) 18.1 *Bond Law Review* 61 (discussing how prospect theory applies to lawyer behaviour during certain types of negotiations in light of section 198J of the NSW Legal Profession Act).

<sup>269</sup> Guthrie, above n 265, 1115; See also Jeffrey J Rachlinski, ‘Gains, Losses, and the Psychology of Litigation’ (1996) 70(1) *Southern California Law Review* 113, 121 (‘Expected utility theory predicts that people make either risk-averse or risk-neutral choices depending upon the magnitude of the stakes relative to their total wealth. In contrast, prospect theory predicts that people make either risk-averse or risk-seeking choices depending upon the characterization of the decision as a loss or as a gain.’).

<sup>270</sup> Guthrie, above n 265, 1118.

guided by a non-rational, subjective assessment based on one's perception of the magnitude of expected or imagined gain or loss. The next four paragraphs discuss each of the four primary components of prospect theory in detail.

The first component of prospect theory deals with ordinary gains and losses. Under the framing of ordinary gains and losses component, when choosing between options that present the probability of a *gain* relative to a specific reference point, prospect theory says that the person will make a risk-averse choice. Conversely, if choosing between options that present the probability of incurring a *loss*, prospect theory holds that the person will make a risk-seeking choice.<sup>271</sup> Guthrie cites the example of winning a prize or paying a fine. Under this first component, 'people will generally choose a definite \$1,000 prize over a 50% chance at receiving a \$2,000 prize' (gain options).<sup>272</sup> Conversely, where there are loss options relative to a particular reference point, decision-makers will generally risk a 50% chance of incurring a \$2,000 fine rather than pay a definite fine of \$1,000.<sup>273</sup> With regards to the use of deception in negotiation, one might expect that if a person has a 100% chance of successfully deceiving the opposing party in a negotiation to their benefit as compared with a 50% chance of being discovered and punished for using deception, the individual will make the choice to deceive the opposing party because they stand to gain from that conduct relative to their perception of loss. Conversely, they will

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<sup>271</sup> Guthrie, above n 265, 1118 (discussing the first component of prospect theory, the framing of ordinary gains and losses).

<sup>272</sup> Guthrie, above n 265, 1118.

<sup>273</sup> Ibid.

choose not to use deception in negotiation if they believe the deception will result in a greater loss than the perceived gain.<sup>274</sup>

The second component of prospect theory concerns a decision-maker's behaviour when faced with low-probability gains and losses. In this circumstance, prospect theory holds that a person's risk preferences are reversed relative to the first component of ordinary gains and losses. In other words, '[i]ndividuals tend to make risk seeking choices when selecting between options that appear to be low-probability gains and risk-averse choices when selecting between options that appear to be low-probability losses.'<sup>275</sup> Using the same example above, people will take the gamble of a 50% chance at winning \$1,000 over a definite \$50 prize; however the same person will tend to prefer paying a definite \$50 fine rather than risk a 5% chance of paying a \$1,000 fine (still \$50 yet a risk-averse choice).<sup>276</sup>

The third component of prospect theory, loss aversion, states that a prospective loss has greater weight on the mind of the decision-maker as compared to a prospective gain of the same value.<sup>277</sup> Therefore, the prospective loss of \$1,000 will be more aggravating and weigh more heavily on a person's mind than a prospective gain of \$1,000.

Finally, the fourth component of prospect theory states that people overvalue a sense of certainty.<sup>278</sup> In other words, decision-makers 'overweigh outcomes that are

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<sup>274</sup> See, eg, White, above n 60, 927 ('if the low probability of punishment means that many lawyers will violate the standard [concerning truthfulness in negotiation], the standard becomes even more difficult for the honest lawyer to follow, for by doing so he may be forfeiting a significant advantage for his client to others who do not follow the rules'; Scott S Dahl, 'Ethics on the Table: Stretching the Truth in Negotiations' (1989) 8 *Review of Litigation* 173.

<sup>275</sup> Guthrie, above n 265, 1118 (discussing the second component of prospect theory, the framing of low-probability gains and losses).

<sup>276</sup> Guthrie, above n 265, 1118.

<sup>277</sup> Kahneman and Tversky, above n 265, 263-291; Guthrie, above n 265, 1118.

<sup>278</sup> Kahneman and Tversky, above n 265, 265; Guthrie, above n 265, 1118.

considered certain relative to outcomes which are merely probable.’<sup>279</sup> Using another example, while most people would ‘prefer a definite prize of a one-week tour of England over a 50% chance of winning a three-week tour of England’, these same individuals would prefer a 5% chance of a three-week tour of England over a 10% chance at a week-long tour.’<sup>280</sup>

Two key aspects drive the conclusions of prospect theory. These same aspects could be construed as limitations to its value; nevertheless, prospect theory is arguably ‘applicable to every area of law’.<sup>281</sup>

The first key aspect that drives prospect theory is the use of a reference point as a critical factor in decision-making.<sup>282</sup> Kahneman and Tversky observed that reference points are important not only in decision-making but also in forming impressions and making judgments. Reference points for a given person may be single or multiple given the circumstances.<sup>283</sup> For example, if litigants compare a settlement offer relative to a best-case scenario at trial, their decision may be different than comparing the same options to a worst-case scenario in terms of gains or losses and the ultimate decision to settle. Reference points are crucial to understanding whether a person will likely make a risk-seeking or risk-averse decision. Reference points may also determine the way in which an offer or counteroffer is framed in the mind of the offeree so as to potentially determine their decision-making preferences.

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<sup>279</sup> Kahneman and Tversky, above n 265, 265; Guthrie, above n 265, 1119.

<sup>280</sup> Ibid.

<sup>281</sup> Guthrie, above n 265, 1120 (‘prospect theory sheds light on the way people behave in each legal area and the way legal doctrine evolved.’) See also Guthrie, above n 265, 1163 (‘...[prospect theory] represents a valuable refinement to the maximization assumption and should inform law teaching, legal scholarship, and policymaking.’).

<sup>282</sup> Guthrie, above n 265, 1159.

<sup>283</sup> Guthrie, above n 265, 1160.

In the context of this thesis and as applied to the use of deception in negotiation, a lawyer's reference point, whether perceived in terms of a gain or loss, might have a significant impact. For example, during discussions with a client, the lawyer may have the authority to settle for \$50,000 with the perception that he might get at least \$65,000 at trial. Presumably, the amount of \$50,000 becomes the reference point. During settlement discussions, if the lawyer gets an offer from the opposing party of \$45,000, he may perceive this in terms of a loss relative to the client's expectation of \$50,000. In addition, the lawyer may use deception or a form of strategic posturing to try and settle for a value closer to \$65,000 and might even reject an acceptable offer of \$50,000 as approved by the client.

A second key aspect that drives prospect theory is that it describes how *individuals*, in general, make risky decisions.<sup>284</sup> It does not take into account differences across individuals, groups, or across cultures. Questions still remain about whether prospect theory can apply to group decision-making due to insufficient experimental studies.<sup>285</sup> Therefore, prospect theory analysis may be used to determine or measure individual decision-making and how various perceptions of gain or loss may drive the need to use deception in negotiation.

Despite certain perceived limitations, law and economic scholars have leveraged prospect theory to develop two related litigation theories to explain how litigants may potentially make decisions in two key scenarios. These scenarios involve ordinary litigation and low-probability or frivolous litigation.

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<sup>284</sup> Guthrie, above n 265, 1160-1161.

<sup>285</sup> Guthrie, above n 265, 1161-1162.

The ‘Framing Theory’<sup>286</sup> of decision-making states that in ‘ordinary’ litigation, plaintiffs and defendants will make different decisions depending on how they perceive the litigation options.<sup>287</sup> In general and consistent with prospect theory, the framing theory predicts that plaintiffs are more likely to prefer settlement over a trial (risk-averse) while defendants would likely prefer trial (risk-seeking).<sup>288</sup>

In contrast, the ‘frivolous framing theory’ applies to frivolous or low probability litigation, where ‘the plaintiff typically chooses between a relatively small settlement amount and a low likelihood of obtaining a much larger amount at trial’ while ‘defendants must choose either to pay some small settlement or face a low likelihood of having to pay a much larger amount at trial.’<sup>289</sup>

In essence, plaintiffs are faced with low probability gain options and defendants are faced with low-probability loss options. The frivolous framing theory, consistent with the second component of prospect theory, states that in this situation, plaintiffs will likely prefer trial (risk-seeking) while defendants will prefer to settle (risk-averse).<sup>290</sup>

In addition to prospect theory’s application to potential litigation behaviour,<sup>291</sup> scholars such as Guthrie, Rachlinski and Painter believe that prospect theory may also help in understanding lawyers’ behaviours with regards to professional responsibility, for example, as defined under the American Bar Association’s Model Rules of

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<sup>286</sup> Rachlinski, above n 269, 113. Rachlinski is often credited with developing this theory.

<sup>287</sup> Note: This likely refers to the litigant’s reference point and may also refer to how a given litigation situation is framed by the lawyer.

<sup>288</sup> Rachlinski, above n 269, 118.

<sup>289</sup> Guthrie, above n 265, 1124-1125.

<sup>290</sup> Ibid.

<sup>291</sup> Note: Guthrie, Rachlinski, and Painter discuss prospect theory as applied to litigation behaviour. Given that litigation behaviour involves significant negotiation, these same principles can apply to negotiations behaviour.

Professional Conduct (MRPC).<sup>292</sup> The MRPC, in addition to providing guidelines for how lawyers should behave in practice, also prohibits lawyers from engaging in certain conduct that is deemed unethical.<sup>293</sup>

In the context of this thesis, prospect theory may be used to better analyse and predict the effectiveness of legal ethics codes. The rational choice theory predicts that lawyers will only violate ethical rules if the expected benefits outweigh the costs. However, prospect theory predicts that lawyers will act unethically depending on how well each lawyer believes the case is progressing such that if things are 'going well (gains), risky ethical violations will seem unattractive' whereas these same violations are more attractive if the case or transaction is progressing poorly.<sup>294</sup>

Painter used two cases<sup>295</sup> to illustrate that prospect theory may account for the lawyers' behaviour in the two cases and 'generally may explain why, sometimes, the worse things get, the more likely a lawyer is to compound his own and his client's troubles with violations of ethical rules, violations of law or both.'<sup>296</sup>

In conclusion, while these three primary theories of decision-making may require further experiential evidence in negotiation, they go some ways to helping explain how participants in the legal system behave whether engaged in true civil litigation or in other dispute resolution processes such as negotiation and mediation. Of particular relevance to this thesis is the possible application of these theories in the

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<sup>292</sup> Guthrie, above n 265, 1139 (citing the American Bar Association Center for Professional Responsibility, *Model Rules of Professional Conduct* (2003)).

<sup>293</sup> American Bar Association Center for Professional Responsibility, *Model Rules of Professional Conduct* <[http://www.abanet.org/cpr/mrpc/mrpc\\_toc.html](http://www.abanet.org/cpr/mrpc/mrpc_toc.html)> at 9 August 2010. I reference MRPC but this applies to codes of conduct for lawyers in other jurisdictions such as the *Legal Profession Act* (2007) Qld in Australia.

<sup>294</sup> Guthrie, above n 265, 1139-1140 (citing Richard W Painter, 'Lawyers' Rules, Auditors' Rules and the Psychology of Concealment' (2000) 84 *Minnesota Law Review* 1399).

<sup>295</sup> Painter, above n 294, 1399. These cases are not discussed here in detail.

<sup>296</sup> Painter, above n 294, 1422.

context of deceptive practices in legal negotiations where lawyers play a prominent role and where professional responsibility collides with potential ethical misconduct and its ramifications. Perhaps better understanding and application of these theories can assist in minimizing or even eliminating the extent to which the use of deception is perceived as beneficial.

### **2.3.8 Theories of Lawyer-Client Relationships and Legal Negotiation**

The degree to which legal practitioners may use deception during negotiations is also influenced by the model of lawyer-client relationship under which the legal practitioner, consciously or unconsciously, practices. While legal practice continues to evolve, there are two widely discussed theories of lawyer-client relationships.<sup>297</sup> In the context of this thesis, a particular model of lawyer-client relationship may influence the degree to which a lawyer uses a particular bargaining ethic and the extent to which deception in negotiation is deemed acceptable.

The first lawyer-client relationship model is the traditional model. The *traditional model of lawyer-client relationship* is based on the adversarial system's view of zealous advocacy and intense client loyalty. This model presumes that lawyers are 'motivated by altruism' and do not allow 'conflicting interests to interfere with his or her devoted service to the client'.<sup>298</sup> Those who subscribe to this view believe it 'unthinkable that lawyers lie to their clients' with a seemingly unwavering view that '[t]he question of whether a lawyer may lie to a client is simply absent'.<sup>299</sup> Even if these same lawyers use deception, the traditional model attempts to 'justify

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<sup>297</sup> See, eg, L Ray Patterson, 'An Inquiry into the Nature of Legal Ethics: The Relevance and Role of the Client' (1987) 1 *Georgetown Journal of Legal Ethics* 43, 44 n 7; Charles Fried, 'The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation' (1976) 85 *Yale Law Journal* 1060, 1060; Freedman, above n 176, 9.

<sup>298</sup> Lerman, above n 60, 666.

<sup>299</sup> Lerman, above n 60, 667.



deception as necessary in order for lawyers to fulfil their duties to their clients', with the duties to the client being paramount over duties to the court or the public.<sup>300</sup>

According to Lerman, the traditional model 'might be viewed as smokescreen that obscures the pecuniary interests of lawyers...lawyers solely devoted to client interests...[in an effort] to reassure clients that their lawyers are not exploiting them.'<sup>301</sup> Within the traditional model, the duty of zealous representation of clients takes precedence over duties to court, the justice system, and public interest. Opponents of this view argue that it is precisely this imbalance between seemingly competing duties that results in lawyers being criticized as 'paternalistic', 'manipulative', or 'exploitive' of their clients<sup>302</sup> to the point of detracting clients from receiving the benefits of the legal system to which they are entitled.

The second lawyer-client relationship model is the *revisionist model*. In an effort to address the concerns raised by the traditional lawyer-client relationship model, such as the fear that such intense loyalty to clients under the traditional model 'leads to too much deception of tribunals',<sup>303</sup> revisionists have 'reconceptualized lawyer-client relationships based on moral analysis and an empirical examination of what actually takes place in interactions between lawyers and clients.'<sup>304</sup> The revisionist model is based on principles of client autonomy and a client-centred practice. Proponents of this model argue that 'the lawyer owes a greater duty to the court than the conception of exclusive loyalty to the client would allow.'

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<sup>300</sup> Lerman, above n 60, 667.

<sup>301</sup> Lerman, above n 60, 673.

<sup>302</sup> Lerman, above n 60, 669. This view of lawyers is common as expressed by the perception of continued resentment of lawyers by the public in a variety of formats.

<sup>303</sup> Lerman, above n 60, 668 (referring to Judge Marvin Frankel's criticism of the traditional model).

<sup>304</sup> Lerman, above n 60, 668.

Under the revisionist model, the client has a larger voice in the decisions that affect the outcome of their legal representation. Revisionists urge lawyers to ‘contract more explicitly about the terms of their employment with their clients, disclose more information to their clients’ and perhaps even adopt an ‘informed consent’ doctrine similar to that used in medical malpractice.<sup>305</sup> The concern for revisionists appears to be in ensuring that lawyers act in accordance with preserving the public interest and confidence in the legal system.

In the context of this thesis, it would seem that if a client is directly involved in his or her case, there is a lesser chance of deception being used, whether in negotiations or otherwise. However, scholars such as Lerman seem to doubt that this model will address ‘the fundamental and pervasive conflict of interest [that] exists between the lawyer and client – the lawyer’s profit motivation’.<sup>306</sup> If the ‘engine that drives the machine is profit’,<sup>307</sup> and that profit comes from the client whose interests the lawyer is meant to serve, then it would seem that this would automatically lead to the lawyer having a greater loyalty to the client’s interests at some expense to his duty of loyalty to the court or the public interest. This is also further complicated by the fact that ‘the traditional model of lawyer-client relationships, upon which the regulatory codes are based, fails to acknowledge anything but a unity of interest between lawyer and client.’<sup>308</sup> This perceived unity of interest seemingly binds the lawyer to the client to the extent that the lawyer may be forced to act in ways that are contrary to the legal ethics codes of conduct and to the detriment of the lawyer if those behaviours are deemed to be unethical.

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<sup>305</sup> Lerman, above n 60, 669.

<sup>306</sup> Lerman, above n 60, 671.

<sup>307</sup> Lerman, above n 60, 672.

<sup>308</sup> Lerman, above n 60, 675.

In summary, both the traditional and revisionist model of lawyer-client relationships appear to co-exist today. Each might affect the degree to which lawyers feel the need to use deception in negotiations.

To date, this chapter of the thesis has presented a theoretical framework that establishes the underlying foundation necessary to answer the research questions identified in Chapter 1. This underlying foundation consists of a discussion on the various theories of law, ethics, negotiation, deception, and lawyer-client relationships which may impact the use of deception as a negotiation strategy. The next section establishes the conceptual framework for the study undertaken in this thesis.

## **2.4 CONCEPTUAL FRAMEWORK**

A conceptual framework is derived from the ideas, constructs, and facts surrounding the study.<sup>309</sup> A conceptual framework may be defined as ‘the relationship among the factors, constructs, or key variables in the enquiry.... [that allows] you to identify a model of what you believe is happening.’<sup>310</sup>

The conceptual framework developed here is based on the exploration of the relationship between the key variables underlying the research questions defined in Chapter 1. These key variables include legal negotiation, legal ethics, lawyers, generally accepted negotiation processes, and bargaining ethics. I postulate the following with regard to the relationship between these key variables: 1) lawyers are trained to believe that the legal ethics codes of the profession guide their professional lives; 2) lawyers recognise that negotiation is a key, every-day skill necessary for

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<sup>309</sup> Calabrese, above n 14, 24.

<sup>310</sup> Calabrese, above n 14, 24 (citing Günter Krumme, *Economic geography: Toward a conceptual framework* (2002) <<http://faculty.washington.edu/krumme/guides/researchguide.html>> at 9 August 2010; Matthew B Miles and A Michael Huberman, *Qualitative data analysis: An Expanded Sourcebook* (2<sup>nd</sup> ed, 1994).

being successful and effective; 3) the negotiation process, in general, is based on centuries-old conventions consisting of pre-defined bargaining ethics and rules, most of which condone some form of deception; 4) when lawyers negotiate, they do so using generally accepted negotiation conventions because the professional ethics codes, charged with providing guidelines on lawyer conduct in practice, are silent or ambiguous on the behaviour of lawyers as negotiators and on the legal negotiation process in general.

Therefore, the likelihood of lawyers being deceptive in negotiations is greater than it would be if both the legal ethics codes and, to some degree, legal education were explicit in their recommendations, condemnations, or expectations of how lawyers should or must act in their role as negotiators within the legal profession. While there is a relatively consistent link between negotiation behaviour and negotiation ethics in the business arena, the legal arena is virtually and consistently silent regarding the nature and application of professional ethics codes to negotiation behaviour. In light of this gap in regulation, lawyers, consistent with being practitioners in the *business* of law, appear to utilise conventional negotiation tactics such as deception. In so doing, lawyers are likely in violation of the professional ethics codes to which they are subject as members of the *profession* of law.

## **2.5 SYNTHESIS OF LITERATURE REVIEW**

The purpose of this section is to present the current state of knowledge in some key topics as determined by the problem statement and research questions. The synthesis of the literature review attempts to identify patterns, themes, common findings and arguments, and gaps in an effort to identify where the research supports

or does not support existing theories or raise questions as they relate to this thesis and the research questions.

In the context of this thesis, this critical analysis of the literature focuses primarily on empirical research that may have been conducted in each area. Empirical research, in the context of this review, means a formal study<sup>311</sup> conducted on a given topic or issue relevant to this thesis, the results of which are published in a scholarly journal. Scholarly publications which do not consist of discussion on empirical research findings are also considered in a given area to the extent that they support the focus of this thesis.

The discussion of the current state of knowledge in the focus areas of this thesis begins with an introduction to the nature of conducting research on negotiation practice. The introduction is followed by a synthesis of the current research on topics such as deception, legal negotiation, legal ethics, lawyers' bargaining behaviour, and lawyers' bargaining ethics. Next, this section provides a critical analysis of existing research, identifying strengths, weaknesses, and gaps in the literature as well as how this thesis attempts to address any identified gaps in existing knowledge.

### **2.5.1 Introduction**

Research into negotiation is at once fascinating and difficult for several reasons. Negotiation is ubiquitous and surpasses the realm of legal negotiations into each person's daily lives. In some ways, we are always negotiating. Negotiation takes on deeper significance when it enters into such realms as family, commercial or legal transactions because of the seriousness of the transaction and its potential

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<sup>311</sup> Note: A formal study consists of following empirical research protocols such as identifying hypotheses, research methodology, sample participants, data collection, data analysis, and results and conclusions. See, eg, Barry Gower, *Scientific method: An historical and philosophical introduction* (1997); Cresswell, above n 15.

implications both on the economic aspects of the negotiation as well as the impact on the relationship between the parties. However, determining what actually happens in negotiations is difficult because of the very nature of the negotiation process and its characteristics.

First, negotiation is a private process and it is the tension between these private and public realms of negotiation, especially for lawyers, that is both the reason for its success as a dispute resolution process and its current scrutiny. The scrutiny comes from concerns that negotiation as a private process may collide with a legal practitioner's other imposed duties of candour and ethical conduct.<sup>312</sup> Many argue that privacy is 'an essential component of good negotiating.'<sup>313</sup> Advantages of the privacy of negotiations include the ability to test ideas or aspects of an agreement before they are fully accepted, exploring alternatives or testing alternatives, allowing parties to change their negotiating positions without fear of recrimination, and enabling parties to 'use, even create, their own subtle communication process...without losing face'.<sup>314</sup>

Second, because of the privacy of negotiation, public knowledge depends on what negotiators are willing to tell the public. This information may not be entirely reliable because of problems of faulty memories, self-serving biases, the 'apparent need to show superiority to the other side and frequently to one's own teammates', and other incentives and posturing that tend to cloud the objective reality of a given

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<sup>312</sup> See, eg, Benjamin, above n 6 (describing negotiation has historically being seen as 'a sign of weakness, preferred by the faint of heart', 'a con game', and carrying 'a taint of being immoral and sinful'.)

<sup>313</sup> David Matz, 'How Much Do We Know About Real Negotiations?' in Peter Carnevale and Carsten K W de Dreu (eds), *Methods of Negotiation Research* (2006) 24.

<sup>314</sup> Matz, above n 313, 24.

negotiation, especially if it is ongoing.<sup>315</sup> In addition, the subtlety of communications inherent in negotiations, such as body language, tone of voice, energy levels, context, and environment are all factors which are not readily subject to objective analysis in order to study negotiation behaviours.<sup>316</sup> Thus, most ‘scholars and journalists have no direct access to what occurs in negotiation, important documents may be misleading or missing, an eye witness participants/reporters have numerous incentives to distort their reports...and inconsistencies in such reports are frequent.’<sup>317</sup>

From an academic standpoint, scholars such as Hollander-Blumoff argue that there are institutional and methodological obstacles to research in legal negotiation in particular.<sup>318</sup> These obstacles are due in part to the nature of law and traditional legal research, which typically involves a review of legal opinions, statutes, and articles written by law professors, resulting in law review articles which generally ‘offer [] the author’s theoretical vision of a legal issue...’.<sup>319</sup> Empirical research may ‘lack the force of law’ such that it may seem safer to rely on controlling authority such as statutes and cases which have greater weight and force than empirical research.

Institutional obstacles into research pertaining to the legal negotiation process or behaviours include the following: 1) there is a fundamental difference in how lawyers are trained in their profession from how they might view social science research and, for example, how social scientists are trained; 2) legal academia often lacks proper training in empirical research in order to carry out valid empirical analysis; 3) empirical research is generally not the basis of legal training nor is it

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<sup>315</sup> Matz, above n 313, 25.

<sup>316</sup> Ibid.

<sup>317</sup> Matz, above n 313, 26.

<sup>318</sup> Rebecca Hollander-Blumoff, ‘Legal Research on Negotiation’ in Peter Carnevale and Carsten K W de Dreu (eds), *Methods of Negotiation Research* (2006) 307, 312-313 (defining ‘empirical’ as ‘involving a systematic collection and analysis of data using social science methodology.’).

<sup>319</sup> Hollander-Blumoff, above n 318, 307.

highly valued within legal academia;<sup>320</sup> and 4) because legal academics do not consider themselves students of social behaviour, there is a basic mistrust in relying on empirical data much less in understanding and evaluating how to use empirical research in the course of their occupation.<sup>321</sup> These institutional obstacles appear to be changing as more legal academics start to recognise the value of sound, practical empirical research as complementing and informing traditional theoretically-based legal research.

From the standpoint of methodological obstacles, the study of legal negotiation poses some interesting challenges.<sup>322</sup> For example, confidentiality and attorney-client privilege may prevent full disclosure by practitioners who are asked to discuss their negotiation behaviours, even with a guarantee of confidentiality by researchers. In addition, there are issues of selection bias, which may affect the degree to which a random and unbiased sample is used in a study that yields objective and reliable data. Finally, there are issues of internal and external validity affected by a legal practitioner's self-interest in participating in a study as well as the methodology used for data collection and analysis. For example, strictly anecdotal data from a non-random group of study participants may not be considered statistically significant in terms of proving validity and generalisability so as to render the results worth of adding value.<sup>323</sup>

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<sup>320</sup> Hollander-Blumoff, above n 318, 313-314 (discussing Epstein & King (2002)'s reporting findings based on review of legal empirical research and finding that many of the legal articles that discussed 'empirical' studies violated many of the methodological principles of social science research including validity, replicability, reliability, and measurement).

<sup>321</sup> Hollander-Blumoff, above n 318, 313-314.

<sup>322</sup> Hollander-Blumoff, above n 318, 314-318.

<sup>323</sup> See, eg, Korobkin, above n 37, 327. ('The greatest shortcoming of empirical observation is that it is difficult to generalize the findings of an empirical study to novel situations.').



A final obstacle to legal negotiation research worth noting is the perception that negotiation and thus research into legal negotiation does not receive the serious attention within legal academia so as to attract sufficient funding for necessary and valuable research.<sup>324</sup> For many of the reasons previously discussed, including the unresolved nature of the legal negotiation process as perhaps a distinct dispute resolution process, legal negotiation may not be considered an area ripe for research, further analysis, and funding simply because of its complex intersection with law, ethics, and other disciplines.

Despite these arguable challenges, there have been attempts at both theoretical and empirical research in the areas of legal negotiation, ethics, and deception that I consider relevant to this thesis. This current state of knowledge and research is discussed briefly below in groups of key topic areas. For example, to understand whether lawyers engage in deceptive behaviour and whether this behaviour is considered unethical or impacts negotiations, it is important to review and understand research related to deception and lying. To determine whether the legal ethics codes are effective in regulating potentially deceptive behaviours in negotiation, an understanding of research on legal ethics as well as how lawyers behave during negotiations is crucial. The next sections will summarise the literature relevant to answering the research questions. The review of literature is followed by a critical analysis of the research, its findings, and its relationship to the research questions presented in this thesis.

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<sup>324</sup> See, eg, Matz, above n 313, 24-31 (discussing some of the reasons why research into negotiation is hard and therefore may determine the extent to which legal academia may fund such research). Note: I do not necessarily agree that valid and empirically based research cannot be done in the area of legal negotiation; however, legal negotiators do have ethical constraints which may prevent the ability to get relevant, quantifiable, and generalisable empirical data. This means particular attention must be paid to using appropriate, reliable research methods.

### 2.5.2 Research About Deception/Lying

Deception in negotiation may be common because of two primary factors: 1) asymmetrical<sup>325</sup> information that is generally a common feature of negotiations; and 2) the difficulty that most people face in detecting deception which makes it easier to mislead others.<sup>326</sup> For example, research has found that very few untrained people can detect lies.<sup>327</sup> In addition, people are generally overconfident in their ability to detect lies<sup>328</sup> which may result in even greater misunderstandings about the extent of deception that occurs in negotiations.

To aid in better understanding and detecting deception, social science as well as negotiation researchers have developed taxonomies about lies and certain deceptions. DePaulo et al's taxonomy of lies is classified according to content, motivation, magnitude and referent (i.e. whether the lie is about the liar, objects, another party or event).<sup>329</sup> Lewicki and Stark identified eighteen (18) ethically questionable negotiation tactics, categorised them into five 'appropriateness' categories and then analysed how subjects within their study would rate these

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<sup>325</sup> Hawker, above n 26, 35 (defining 'asymmetrical' as 'lacking symmetry'; synonymous with uneven, unbalanced, and irregular). In the context of negotiation, information may be considered asymmetrical because of how much accurate information is exchanged, or how it is interpreted by the lawyer or mediator or other key stakeholder and how this information is perceived or received by the other. In the case where the negotiation is facilitated by a third party, such as a lawyer or a mediator, the chance of asymmetrical information is greater because there is little direct communication. Even if there is direct communication between the negotiating parties, heuristics and biases might impact the facts.

<sup>326</sup> Maurice E Schweitzer and Rachel Croson, 'Curtailling Deception: The Impact of Direct Questions on Lies and Omissions' (1999) 10(3) *The International Journal of Conflict Management* 225, 226.

<sup>327</sup> See, eg, P J DePaulo, 'Research on deception in marketing communications: Its relevance to the study of nonverbal behaviour' (1988) 12 *Journal of Nonverbal Behavior* 253-273; P Ekman and W V Friesen, 'Detecting deception from body or face' (1974) *Journal of Personality and Social Psychology* 288-298; P J DePaulo and B M DePaulo, 'Can deception by sales persons and customers be detected through non-verbal behavioral cues?' (1989) 19 *Journal of Applied Psychology* 1552-1577; P Ekman and M O'Sullivan, 'Who can catch a liar?' (1991) 246 *American Psychologist* 913-920.

<sup>328</sup> See, eg, Ekman and O'Sullivan, above 327, 913-920.

<sup>329</sup> See B M DePaulo, D Kashy, S E Kirkendol, M M Wyer, and J A Epstein, 'Lying in everyday life' (1996) 70 *Journal of Personality and Social Psychology* 975-995.

tactics.<sup>330</sup> Certain forms of lies and deception were part of this list. In addition, Rivers<sup>331</sup> leveraged the work of Lewicki and Robinson et al<sup>332</sup> to create a new inventory of ethically ambiguous negotiation tactics (EANTs) called the HAATTIN (How Appropriate Are These Tactics In Negotiation) inventory based on a review of business ethics literature including deceptive communication literature<sup>333</sup> and workplace deviance literature.<sup>334</sup> This inventory categorizes 24 items (tactics) under eight (8) types of EANTs.<sup>335</sup> These eight types are: ‘1) withholding information from the other party; 2) making promises that are not sincere; 3) threatening the other party; 4) using or saying untruthful information but not as a threat or as a promise; 5) using positive feelings toward the other party; 6) using negative emotions/feelings toward the other party; 7) intentionally unsettling or wearing the other party down but not by threats or by lying; and 8) diverting attention of the other party away from the current negotiations’.<sup>336</sup> Types 1 and 4, in particular, concern lies of omission and lies of commission, respectively, when reviewing the specific behaviours under these types.<sup>337</sup> In addition to the taxonomies presented above, there are several studies on deception worth noting as they help to explain the extent to which lawyers may use

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<sup>330</sup> See Roy J Lewicki and Neil Stark, ‘What is ethically appropriate in negotiations: an empirical examination of bargaining tactics’ (1995) 9(1) *Social Justice Research* 69-95.

<sup>331</sup> See generally Rivers, above n 77. This study was to rate the appropriateness of each of the HAATTIN inventory of ethically ambiguous tactics by a total of 135 Australian business contacts of the researcher. The research is continuing.

<sup>332</sup> R J Robinson, R J Lewicki, and E M Donahue, ‘Extending and testing a five factor model of ethical and unethical bargaining tactics: Introducing the SINS scale’ (2000) 21(6) *Journal of Organizational Behavior* 649-664 (developed a typology of EANTs called the SINS (Self-reported Inappropriate Negotiation Strategies) scale. The SINS scale consisted of 16 items sorted into 5 types of tactics. The five types of tactics were: 1) traditional competitive bargaining; 2) attacking an opponent’s network; 3) false promises; 4) misrepresentation/lying; and 5) inappropriate information gathering.)

<sup>333</sup> Rivers, above n 77, 11 (citing S A McCornack, ‘Information manipulation theory’ (1992) 59(March) *Communication Monographs* 1-16.

<sup>334</sup> Rivers, above n 77, 11 (citing S L Robinson and R J Bennett, ‘A typology of deviant workplace behaviors: A multidimensional scaling study’ (1995) 38(2) *Academy of Management Journal* 555-572; E D Scott and K A Jehn, ‘Ranking rank behaviors’ (1999) 38(3) *Business and Society* 296-325.

<sup>335</sup> Rivers, above n 77, 11.

<sup>336</sup> Ibid.

<sup>337</sup> Ibid.

deception in practice, how to manage deceptive behaviour, and whether deception can effectively be regulated.

In 1999, Schweitzer and Croson published the findings of their research on curtailing deception.<sup>338</sup> Their research involved determining whether direct questions would assist in curtailing lies of commission and lies of omission. Their research has some relevance in this study because of the variables tested and results obtained regarding the intersection of ethics and deception. Schweitzer and Croson conducted two studies, which are discussed briefly below.

Study 1 involved a self-reported questionnaire where subjects were asked to assume the role of the seller of a used car, one that has a transmission problem that needs work but does not require immediate attention. Study 1 consisted of eighty (80) graduate students recruited from different universities in southern United States.<sup>339</sup> Participants were asked to complete one of four versions of a self-reported questionnaire. A total of twenty (20) subjects completed each of the four versions of the questionnaire.<sup>340</sup> Subjects were asked how likely they were to reveal the transmission problem to a friend and to a stranger who asks or does not ask about the mechanical condition of the car.<sup>341</sup>

Schweitzer and Croson made three primary assumptions along with four hypotheses in this first study. Their assumptions are worth noting here because they expected that ‘subjects who are asked a direct question to be less likely to use deception than subjects who are not asked direct questions.’<sup>342</sup> Their assumptions

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<sup>338</sup> See generally Schweitzer and Croson, above n 326, 225-228.

<sup>339</sup> Schweitzer and Croson, above n 326, 230.

<sup>340</sup> Ibid.

<sup>341</sup> Schweitzer and Croson, above n 326, 228.

<sup>342</sup> Ibid.

were: 1) people can choose to either lie by omission, lie by commission, or reveal the truth; 2) most people would rather lie by omission than lie by commission given prior work in this area that showed that most people would judge lies by commission more harshly and seriously than omissions;<sup>343</sup> and 3) direct questions force people to articulate a response and chose between telling a lie by commission and revealing the truth.<sup>344</sup>

Along with the three assumptions above, Schweitzer and Croson made four hypotheses, one of which considered the role of ethics and whether ethics education has an impact in curtailing deception.<sup>345</sup> Specifically, Schweitzer and Croson's third hypothesis was that 'subjects who have taken a course in ethics will be less likely to use deception than those who have not taken a course in ethics.'<sup>346</sup> The results regarding this hypothesis may be particularly relevant in determining whether the legal profession's ethics codes, in particular its prohibition against deceptive or misleading practices, combined with a professional ethics courses in law school have any bearing at all on reducing the seemingly ubiquitous practice of deception in negotiations.

As to the results of Study 1, the average respondent's age was 26.6 years old and 65% of the respondents were male.<sup>347</sup> There were no significant differences in the results along gender lines.<sup>348</sup> Across all treatment conditions and all responses,

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<sup>343</sup> Schweitzer and Croson, above n 326, 228 (citing M Spranca, E Minsk, and J Baron, 'Omission and commission in judgment and choice' (1991) 27 *Journal of Experimental Social Psychology* 76-105.

<sup>344</sup> Schweitzer and Croson, above n 326, 228.

<sup>345</sup> Schweitzer and Croson, above n 326, 229 (discussing the possible role of ethics and ethical education in curtailing the use deception)

<sup>346</sup> Schweitzer and Croson, above n 326, 229; See also R F Duska, 'What's the point of a business ethics course' (1991) 1 *Business Ethics Quarterly* 333-354; T Jones, 'Can business ethics be taught: Empirical evidence' (1989) 8 *Business and Professional Ethics Journal* 73-93.

<sup>347</sup> Schweitzer and Croson, above n 326, 229.

<sup>348</sup> Ibid.

only 6 respondents (7.5%) said they would tell a prospective buyer about the transmission problem regardless of being asked or not and regardless of whether the person was a stranger or friend.<sup>349</sup> This appeared to show that a substantial majority of respondents might mislead a prospective buyer in certain circumstances<sup>350</sup> and the motivation appeared to be based on self-interest (i.e. a financial gain).

Schweitzer and Croson found that, on average, respondents were ‘most likely to reveal the mechanical problem to friends who asked, next most likely to reveal to friends who did not ask, third most likely to reveal to strangers who asked, and least likely to reveal to strangers who did not ask.’<sup>351</sup> The finding that friendship mattered appears consistent with studies that contextual factors such as relationships affect a negotiator’s propensity to lie<sup>352</sup> and that ‘friends are held more responsible than strangers’<sup>353</sup> because of greater consequences to friends such as harming the relationship, disturbing the social network, and incurring feelings of guilt or remorse even if the lie is not detected or found out.<sup>354</sup>

Schweitzer and Croson also found that there were no ‘differences between the responses of the 42 (52.5%) subjects who had taken an ethics course and those of the 38 (47.5%) subjects who had not taken an ethics course.’<sup>355</sup> While those who had taken an ethics course were less likely to lie, the difference was not statistically significant to conclude that ethics education will necessarily curtail deceptive conduct

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<sup>349</sup> Schweitzer and Croson, above n 326, 229.

<sup>350</sup> Ibid. This is consistent with the natural inclination of human nature to protect one’s self-interest and achieve the greatest gain.

<sup>351</sup> Schweitzer and Croson, above n 326, 231.

<sup>352</sup> Schweitzer and Croson, above n 326, 227 (citing the works of R A Maier and P J Lavrakas, ‘Lying behavior and the evaluation of lies’ (1976) 42 *Perceptual and Motor Skills* 575-581; J Haidt and J Baron, ‘Social roles and the moral judgment of acts and omissions’ (1996) 26 *European Journal of Social Psychology* 201-218).

<sup>353</sup> Schweitzer and Croson, above n 326, 229.

<sup>354</sup> Ibid.

<sup>355</sup> Schweitzer and Croson, above n 326, 231.

in negotiation.<sup>356</sup> This finding is important when reviewing the policy reform proposals in Chapter 7.

Schweitzer and Croson's Study 2 did not involve self-reported questionnaires but consisted of a face-to-face negotiation experiment involving the sale of a used computer with a faulty hard drive.

A total of 148 student-participants were recruited for this study. Participants were recruited from two different schools of business in the United States. One hundred (100) subjects were recruited from a large eastern university and 48 subjects were recruited from a large southern university in the United States.<sup>357</sup> To minimize certain biases or preconditioned responses, the subjects were recruited during their first week of starting university and before participants could form strong relationships or reputations or have significant education in negotiation.<sup>358</sup> Participants were randomly paired and assigned to the role of either buyer or seller and given twenty minutes to prepare for the negotiation.

In Schweitzer and Croson's second study, the seller knows about the problem with the computer and also knows that the buyer is unaware of the faulty hard drive issue.<sup>359</sup> Schweitzer and Croson used three 'treatment conditions' (strong, moderate, and weak) which were intended to influence the number of questions used by the buyer-subjects when enquiring into the sale of the computer. Finally, because of the face-to-face aspect of the simulated negotiations, Schweitzer and Croson were able to

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<sup>356</sup> Schweitzer and Croson, above n 326, 231. It would be interesting to determine whether this is consistent with the greater impact of community ethics or even pragmatism over rules and principles. See also Mark Victor Hansen, *Cracking the Millionaire Code: Your Key to Enlightened Wealth* (2005) 272 (Mr Hansen is speaking with the father of a very bright and industrious six year-old and states: 'Mr Tighe, every kid's born honest, ethical, and moral. They have to be taught to be crooked and go side ways. I don't think we have to worry about Tommy. Kids all pay back with interest.')

<sup>357</sup> Schweitzer and Croson, above n 326, 236.

<sup>358</sup> Ibid.

<sup>359</sup> Schweitzer and Croson, above n 326, 234.

observe whether seller-subjects would lie about the information (lies of commission), conceal the information (lies by omission), or reveal the information to the prospective buyer-subjects.<sup>360</sup> Negotiations were audio-taped and coders analysed the audio recordings and measured the impact of direct questions on deceptive behaviour.<sup>361</sup>

During the second study, Schweitzer and Croson had three primary hypotheses: 1) seller-subjects are more likely to reveal a material problem when asked a direct question than when not asked;<sup>362</sup> 2) seller-subjects are less likely to lie by omission when asked a direct question about a material problem;<sup>363</sup> and 3) seller-subjects are more likely to lie by commission when asked a direct question.<sup>364</sup> In other words, Schweitzer and Croson 'expect[ed] deception to be more prevalent when buyers do not ask a direct question.'<sup>365</sup> If a buyer asks direct questions, the seller will either reveal the problem (i.e., tell the truth) or lie about the information (lie by commission). If the buyer does not ask direct questions about the problem, the seller will either reveal the problem or conceal the information (lies by commission).<sup>366</sup>

In Study 2, of the 148 subjects recruited to participate, all the participants completed the exercise. The average age of the participants was 25.3 years old with 2.9 years of full-time work experience.<sup>367</sup> Males accounted for 66.9% of the participants.<sup>368</sup>

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<sup>360</sup> Schweitzer and Croson, above n 326, 234.

<sup>361</sup> Ibid.

<sup>362</sup> Schweitzer and Croson, above n 326, 235.

<sup>363</sup> Ibid.

<sup>364</sup> Schweitzer and Croson, above n 326, 236.

<sup>365</sup> Schweitzer and Croson, above n 326, 235.

<sup>366</sup> Schweitzer and Croson, above n 326, 236 figure 6.

<sup>367</sup> Schweitzer and Croson, above n 326, 238.

<sup>368</sup> Ibid.



In analysing the results of Study 2, Schweitzer and Croson did not find any statistically significant differences between the two university populations across the measures and outcomes.<sup>369</sup> Their findings confirmed all three of their hypotheses, namely: 1) ‘sellers were significantly more likely to reveal the problem when buyers asked them about the reliability of the computer’<sup>370</sup> than when buyers did not ask; 2) ‘sellers were more likely to lie by omission when not asked a direct question’;<sup>371</sup> and 3) ‘sellers were more likely to lie by commission when they were asked a direct question’<sup>372</sup> than when they were not so asked. Schweitzer and Croson found that none of the sellers revealed the problem on their own and even ‘volunteered lies of commission’.<sup>373</sup> This aspect of the results is interesting in the sense that sellers were in a typical bargaining scenario where they had more information and could gain a greater financial advantage at the expense of the buyer by actively using deception even when not necessary. This was compounded by the voluntary lies of commission where self-interest and financial incentives encouraged a competitive nature on the part of the seller that lead to greater lying.

While Schweitzer and Croson’s study involved mainly business students, Lerman’s study is relevant to the issue of deception in the legal profession. In the late 1980s, Lerman conducted an informal study of legal professionals in the United States to ‘probe the fabric of daily law practice to identify common types of deception.’<sup>374</sup> Lerman’s informal study consisted of identifying whether lawyers deceived clients and the ways in which such deception occurred. The subject-participants in Lerman’s

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<sup>369</sup> Ibid.

<sup>370</sup> Schweitzer and Croson, above n 326, 241.

<sup>371</sup> Ibid (meaning that the seller either avoided the topic or said nothing).

<sup>372</sup> Schweitzer and Croson, above n 326, 241.

<sup>373</sup> Ibid.

<sup>374</sup> Lerman, above n 60, 703-704.

study consisted of twenty (20) lawyers in the United States who engaged in civil practice at various levels, including small firms, large firms, local practice and national practice. The subjects were not randomly chosen and were part of Lerman's personal network. In addition, while the sample size was not statistically significant, the lawyers represented a 'diverse spectrum of educational backgrounds, including national, regional, and local law schools'<sup>375</sup> and none of the lawyers had ever been professionally disciplined at the time of their participation in the informal study.<sup>376</sup> Lerman used an in-person interview method whenever possible. In some cases, where in-person interviews were not practical, Lerman conducted phone interviews.<sup>377</sup> Each lawyer was asked to 'talk [] about specific instances in which she [or he] had deceived a client or had seen another lawyer do so'.<sup>378</sup> Each lawyer was also asked 'whether the lawyer thought the conduct was justifiable and why'.<sup>379</sup> Lerman reported the stories in narrative form so as to keep the results more real and close to actual law practice.

The results from Lerman's interviews suggested that lawyers 'most frequently deceive their clients for economic reasons'.<sup>380</sup> Lerman described the economic benefits as being either direct ('as when a lawyer's intention in deceiving was to obtain income') or indirect ('intended to protect or promote the lawyer's professional reputation or that of the lawyer's firm').<sup>381</sup> Lerman also concluded that the primary reasons why lawyers deceived clients, which she termed as 'self-interested

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<sup>375</sup> Lerman, above n 60, 704.

<sup>376</sup> Ibid.

<sup>377</sup> Ibid.

<sup>378</sup> Ibid.

<sup>379</sup> Ibid.

<sup>380</sup> Lerman, above n 60, 705.

<sup>381</sup> Ibid.

deception', fell into six broad categories: 1) billing;<sup>382</sup> 2) bringing in business; 3) covering up mistakes; 4) impressing clients; 5) convenience and control of work and time; and 6) impressing the boss.<sup>383</sup> In analysing the anecdotal data, Lerman identified some patterns with regards to the lawyers' reported deceptive conduct.

First, lawyers reported 'pervasive deception' in the area of client billing, which in some cases involved large amounts of money.<sup>384</sup> Second, there were 'numerous examples of deception' concerning the extent of the lawyers' own degree of expertise in a given area or the expertise of the firm.<sup>385</sup> Third, the most reported deception was about mistakes made in the course of representing clients, efforts to correct the mistake and whether to charge the client for the time and effort to correct mistakes.<sup>386</sup> Finally, the findings showed 'countless deceptions' by lawyers designed to manage the work load and time, for the lawyers' convenience, and to create particular impressions on clients and partners alike.<sup>387</sup> Lerman concluded that '[l]awyers deceive their clients more than is generally acknowledged by the ethics codes or by the bar.'<sup>388</sup> Citing the American Bar Association 1985 statistics on lawyer misconduct for deception,<sup>389</sup> Lerman argues that it shows 'how few lawyers are disciplined by the existing regulatory system.'<sup>390</sup>

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<sup>382</sup> See Susan Saab Fortney, 'Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements' (2000) 69 *University of Missouri-Kansas City Law Review* 239 (concurring with Lerman's findings with regards the impact of billable hours).

<sup>383</sup> Lerman, above n 60, 705-706.

<sup>384</sup> Lerman, above n 60, 665.

<sup>385</sup> Ibid.

<sup>386</sup> Ibid.

<sup>387</sup> Ibid.

<sup>388</sup> Lerman, above n 60, 663-664.

<sup>389</sup> Lerman, above n 60, 702 (citing the American Bar Association disciplinary action statistics of 1985 in which 'the offense of general misrepresentation accounted for five percent of all disbarments (22 cases), six percent of all suspensions (38 cases), and four percent of all public reprimands (13 cases).')

<sup>390</sup> Lerman, above n 60, 703.

While there may be numerous views and research into deception and lying, Lee et al's 2001 empirical study<sup>391</sup> on lying is worth discussing because of its potential implications for understanding the use of deception from a cross-cultural standpoint.<sup>392</sup> The focus of the study was a comparative analysis on children and lie- or truth-telling in Taiwan, mainland China, and Canada. However, Lee et al's 2002 study is worth noting and important for three main reasons.

First, while the study did not involve adults, legal practitioners or students, the results may shed some light on how legal practitioners from differing legal jurisdictions develop their initial ethical framework and how they may view and contend with perceptions of lying in their potentially differing socio-cultural legal jurisdictions, either before entering legal education or during the course of practice. Second, this study is important in understanding how legal education and the legal profession can better educate incoming law students and practitioners with regards to professional ethics codes and managing ethical dilemmas. This second aspect is also relevant to the policy reform proposals discussed in Chapter 7. Finally, this study may also shed light on how the social ethics of a culturally diverse legal jurisdiction might affect the legal ethics imposed on practitioners of that jurisdiction.

Lee et al undertook their study of children's moral judgment of lie- and truth-telling due to two main reasons. First, they felt that nearly all current research, except for one,<sup>393</sup> was restricted to using Western children as subjects and thus likely the result of perspectives based on Western principles. Because of this, it was 'unclear

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<sup>391</sup> See generally Lee et al (2001), above n 72, 525-542.

<sup>392</sup> Note: the legal profession could be considered a 'culture' and, therefore, this study provides some insight on the influences and pressures of conforming to the legal culture's expectations.

<sup>393</sup> Kang Lee et al, 'Chinese and Canadian children's evaluations of lying and truth-telling' (1997) 64 *Child Development* 924-934. The 2001 study was a follow on to this 1997 study.

whether the findings with Western children can be generalized to children of other cultural backgrounds who may be raised in different moral-ethical traditions'.<sup>394</sup>

Second, Lee et al wished to address the 'important philosophical debate between two opposing views...about the moral values of lying',<sup>395</sup> namely the deontological view and the social-conventional views discussed earlier in this chapter.

Lee et al's 2001 study extended the findings of Lee et al's 1997 study in which Canadian and mainland Chinese children were asked to evaluate verbal statements made in the context of children's stories where the child character performed either a pro-social or anti-social deed.<sup>396</sup> Lee et al's 1997 study found that there were no cultural differences in the children's evaluation of a lie or truth told in an anti-social deed situation.<sup>397</sup> In other words, both Canadian and mainland Chinese children were able to distinguish consistently between whether the child character told a lie or the truth in an anti-social deed.<sup>398</sup> However, in a pro-social deed situation (i.e. where the child acts in a socially positive way), Lee et al's 1997 study found that 'Chinese children rated truth-telling less positively and lie-telling more positively than Canadian children [and] this difference increased with age.'<sup>399</sup> Lee et al's 1997 study suggested that the cultural differences in the findings may be due to the Chinese culture's emphasis on self-effacement and modesty such that '[a]s they become increasingly acculturated the emphasis on modesty leads Chinese children to believe that lying for self-effacement has high moral values, whereas truth-telling about good

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<sup>394</sup> Lee et al (2001), above n 72, 526-527.

<sup>395</sup> Ibid.

<sup>396</sup> Lee et al (2001), above n 72, 527 (a pro-social deed is one that would be considered favourably by society and an anti-social deed is not seen favourably by society, citing Kang Lee et al (1997), above n 393).

<sup>397</sup> Lee et al (2001), above n 72, 527.

<sup>398</sup> Ibid.

<sup>399</sup> Ibid.

deeds may be undesirable.’<sup>400</sup> This was different from the Canadian children’s views where it appears that truth-telling about good deeds has just as much high moral value as truth-telling about bad deeds.

To account for several perceived limitations<sup>401</sup> of the Lee et al’s 1997 study as well as to extend and confirm the research findings, Lee and his colleagues, during the 2001 study, used the same method as used in Lee et al’s 1997 study with two modifications. These modifications included increasing the sample size to take into account Taiwanese children and asking the children ‘to categorize a particular truthful and untruthful statement as either a lie or the truth’.<sup>402</sup>

The subjects of the 2001 study were children from Taiwan, mainland China and Canadian, aged 7, 9, and 11 years old. A total of 233 children participated with the following distribution between countries: 1) 90 male and female Taiwanese children; 2) 60 male and female mainland Chinese children; and 3) 83 white male and female Canadian children.<sup>403</sup> Canadian children were intended to represent a Western sample with ideas of rights and individualism. While both Taiwanese and mainland Chinese children represent the Eastern values and are collectivist societies, Lee and his colleagues considered that collectivist values from Taiwan come directly, and without interruption, from Confucianism whereas mainland China’s collectivist values are a blend of Confucianism and communism.<sup>404</sup>

Lee et al’s 2001’s study focused on whether these collectivist values would make a difference in the study’s results with regards to the moral value of truth-telling

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<sup>400</sup> Ibid (discussing Lee et al (1997), above n 393).

<sup>401</sup> Lee et al (2001), above n 72, 528 (discussing the limitations of the Lee et al (1997) study).

<sup>402</sup> Ibid.

<sup>403</sup> Lee et al (2001), above n 72, 529.

<sup>404</sup> Lee et al (2001), above n 72, 536.

and lie-telling. In addition, both Taiwan and mainland China have different political and economic policies<sup>405</sup> despite their close geographic proximity, with Taiwan having ‘increased infusion of Western cultural values and practices...into [their] everyday lives.’<sup>406</sup> Finally, there is a difference in the political-moral education program in mainland China versus in Taiwan. In mainland China, ‘honesty and modesty are among the major Five Virtues that are strongly emphasized in the school curriculum...promoted explicitly as early as kindergarten....and are used by teachers as central criteria to assess children’s school comportment.’<sup>407</sup> In Taiwan, ‘honesty has always been promoted...and children are taught explicitly not to lie from Grade 1 if not earlier...’<sup>408</sup> However, ‘modesty has not been emphasized explicitly in the moral education curriculum...and teaching modesty is no longer a requirement.’<sup>409</sup>

Children involved in the 2001 study heard ‘two sets of four brief stories’. Each story set consisted of two stories where a child character did a good deed (‘a deed valued by adults in all cultures involved’).<sup>410</sup> The other set of two stories consisted of a child who did a bad deed (‘a deed viewed negatively in all cultures involved’).<sup>411</sup> The stories were a combination of social stories (ones which affect

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<sup>405</sup> Lee et al (2001), above n 72, 536 (describing Mainland China as ‘a centralized one-party political system (referred to as ‘proletarian dictatorship by the governing Communist Party) and a socialist market economy’ and Taiwan as ‘a multi-party democracy...[and a] capitalist free-market system influenced by Western models...’)

<sup>406</sup> Lee et al (2001), above n 72, 536 (citing K S Yang and H Y Chiu (eds) *Taiwanese society in transition* (1987)).

<sup>407</sup> Lee et al (2001), above n 72, 536 (citing Lee et al (1997), above n 393, 924-934; R Price, ‘Moral-political education and modernisation’ in R Hayhoe (ed) *Education and modernization: the Chinese experience* (1992) 211-238.

<sup>408</sup> Lee et al (2001), above n 72, 537.

<sup>409</sup> Lee et al (2001), above n 72, 537 (citing the National Publishing House 1977 and 1997 guidelines as indicating that the Taiwan Ministry of Education revised its guidelines with regards to teaching modesty but did not revise the guidelines with regards to teaching honesty.); See also National Publishing House: Taiwan, *Guidelines for moral and health education* (1977); National Publishing House: Taiwan, *Guidelines for moral and health education* (1997).

<sup>410</sup> Lee et al (2001), above n 72, 528-529.

<sup>411</sup> Ibid.

another child) and physical stories (ones that only involve physical objects).<sup>412</sup> The researchers read the story to the subject-participants and asked the children whether they ‘thought that the statement made by the child story character was a lie or not a lie (the categorization question) and whether they thought the story character’s statement was good or bad (the moral evaluation question).’<sup>413</sup>

With regards to expected results, Lee and his colleagues expected to see the following results: 1) that ‘Chinese children would not label untruthful statements made in pro-social deed situation as a lie’;<sup>414</sup> 2) that ‘Taiwanese and Mainland Chinese children were predicted to rate truth-telling in pro-social deed situations less positively, and lie-telling in the same situations less negatively, than Canadian children’;<sup>415</sup> and 3) that all children ‘would rate lie-telling negatively and truth-telling positively in anti-social deed situations.’<sup>416</sup>

The results of the 2001 study confirmed the majority of the findings from Lee et al’s 1997 study. In the 2001 study, Lee and his colleagues found that all children (Taiwanese, mainland Chinese, and Canadian) ‘shared the same basic categorization of lie- and truth-telling’ as related to the categorisation question.<sup>417</sup> In other words, when asked to categorise a particular statement as a lie or not a lie, all the child-participants were able to correctly and consistently distinguish between statements that were considered a lie or a truth regardless of whether the statement was made in a pro-social or anti-social deed situation.

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<sup>412</sup> Lee et al (2001), above n 72, 528-529.

<sup>413</sup> Ibid. Note: The results of the moral evaluation question is relevant to this thesis in assessing how ethics codes are viewed and the impact of morals and values in curtailing certain socially undesirable behaviours such as deception.

<sup>414</sup> Lee et al (2001), above n 72, 529.

<sup>415</sup> Ibid.

<sup>416</sup> Lee et al (2001), above n 72, 529.

<sup>417</sup> Lee et al (2001), above n 72, 536.



With regards to the moral evaluation question, the findings of the 2001 study also confirmed the ‘modesty effect’ that was found in the Lee et al’s 1997 study in which Chinese children increasingly (as age increased) gave less positive ratings to a story character ‘who does something good and tells a teacher about it’.<sup>418</sup> This modesty effect appears to exist even in Taiwanese children since, as the age increased, ‘Taiwanese children also rated less positively truth-telling about one’s own good deed while giving more positive rating to lying about a good deed.’<sup>419</sup>

Lee and his colleagues questioned the children regarding a justification for their responses to the moral evaluation question and found that ‘Chinese children’s [Mainland China and Taiwan] justification for giving less negative and more positive ratings to lying in pro-social situations and the reverse to truth-telling in similar situations tended to be modesty-related, consistent with Lee et al’s study in 1997.’<sup>420</sup> This led Lee and his colleagues to conclude that perhaps the deontological view of the constant and intrinsic positive value placed on truth-telling and the negative value placed on lie-telling was incomplete given the similarity in results between Mainland Chinese and Taiwanese children.

Lee et al’s 2001 study suggests that ‘like many other cultural values and practices, modesty-related values and behaviours may be modelled and taught implicitly by teachers, parents and other socializing agents.’<sup>421</sup> This implicit teaching of certain values and behaviours is particularly relevant to the legal profession since the legal ethics codes may, in many cases, be more strict than society’s views of what is moral and ethical or vice versa. At least with regards to deception, society may

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<sup>418</sup> Ibid.

<sup>419</sup> Ibid.

<sup>420</sup> Ibid.

<sup>421</sup> Lee et al (2001), above n 72, 537.

condone what the legal profession appears to categorically prohibit, thus resulting in a conflict for the ethically-minded legal professional. Furthermore, Lee et al's 1997 and 2001 study sheds insight into the notion that values such as truth-telling and lie-telling may be learned and reinforced through various influences and that such conduct may be modified through alternate influences. These findings add value to the policy reform proposals outlined in Chapter 7.

In summary, this section has presented the results of research into deception, the extent to which practitioners engage in deception and the ways in which deception is perceived as acceptable or unacceptable behaviour. In the context of this thesis, this research is important in establishing that the perception of deception as permissible behaviour can be managed early in a child's development and as the individual undergoes moral development as explained by Kohlberg later in this chapter. Furthermore, as Lee et al's study found, designating truth-telling as a high, pro-social value can have an impact on whether a person will use deception. As such, this research adds important insights in light of the policy reform proposals presented in Chapter 7.

In addition to research on deception, the next section discusses some relevant research and analysis with regards to behaviour in legal negotiation.

### **2.5.3 Research About Legal Negotiation**

In the context of this thesis, legal negotiation, as separate from negotiation, is the process of negotiation as conducted by legal professionals and as constrained by the rules, codes of conduct, court rules, and ethics codes of the legal system.

In 1983, Williams undertook one of the most extensive studies of legal negotiation. William's study is considered to be one of the first large-scale studies of

legal negotiation conducted by an academic on the negotiation practices and behaviours of lawyers.<sup>422</sup> The objective of Williams' study was to explore the negotiating patterns of practicing attorneys within the context of the legal system.

Williams used multiple methods to conduct his research. First, he used a survey questionnaire. The survey questionnaire was sent to approximately 2,000 attorneys practicing in Denver, Colorado and Phoenix, Arizona in the United States.<sup>423</sup> The purpose of the questionnaire was to elicit the attorneys' views on a list of adjectives that make up a highly effective or not highly effective negotiator. A second method was a one-hour tape-recorded interview with forty-five (45) attorneys in Denver, Colorado in the United States.<sup>424</sup> A third method involved video-taped recordings of experienced negotiators conducting negotiations.<sup>425</sup> A total of seven cases were analysed across a range of matters including personal injury, breach of contract, divorce, criminal law, landlord-tenant, and business transactions. Finally, Williams used an original technique in which he asked both plaintiff and defence attorneys in a case to keep oral, tape-recorded accounts of their actions as they moved step-by-step through their cases.<sup>426</sup> The results of this fourth method included self tape-recorded accounts of more than fifty (50) pairs of attorneys in Denver, Colorado and over one-hundred (100) in Phoenix, Arizona.<sup>427</sup>

Williams posed several research questions, including: '1) What are the characteristics of effective negotiators?; 2) Are there identifiable patterns to their negotiating behaviours?; 3) What strategies do lawyers most commonly use?; 4) What

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<sup>422</sup> See generally Williams, above n 202.

<sup>423</sup> Williams, above n 202, 15-16.

<sup>424</sup> Ibid.

<sup>425</sup> Williams, above n 202, 15-16.

<sup>426</sup> Williams, above n 202, 17.

<sup>427</sup> Ibid.

combination of traits are found in the most effective (and most ineffective) negotiators?; and 5) What are their strong points and what are their weak points?’<sup>428</sup>

Several results of Williams’ study are relevant for the purposes of this thesis.<sup>429</sup> First, Williams found that a majority of subject-participants exhibited one of two primary negotiating patterns: cooperative (65%) or competitive (24%).<sup>430</sup> Approximately 11% of participants did not fall within these two dominant patterns. Second, Williams concluded that ‘the higher proportion of cooperative attorneys (65%) who were rated effective (38%) does suggest that it is more difficult to be an effective (6%) competitive (24%) negotiator than an effective cooperative one.’<sup>431</sup> In essence, the results appear to indicate that lawyers who use cooperative styles of negotiation appear to be more effective than those who adopt more competitive negotiation behaviours even though both cooperative and competitive negotiation styles are effective. Perhaps the most relevant and surprising result for the purposes of this thesis is the lawyers’ assessment of where ‘acting ethically’ ranks in the list of characteristics of effective or non-effective negotiating styles. Williams noted the following when he listed and compared the motivational objectives between cooperative and competitive negotiators.

**Table 2.3: Top Three Motivational Objectives of Negotiators**<sup>432</sup>

Effective/Cooperative	Effective/Competitive
• Conducting self ethically	• Maximizing settlement for client
• Maximizing settlement for client	• Obtaining profitable fee for self
• Getting fair settlement	• Outdoing or outmanoeuvring the opponent

<sup>428</sup> Ibid.

<sup>429</sup> See generally Williams, above n 202, 18-27 (discussing the results of the study).

<sup>430</sup> Williams, above n 202, 18.

<sup>431</sup> Williams, above n 202, 19.

<sup>432</sup> Williams, above n 202, 20 (listing the Cluster One results).

Williams points out that ‘it is surprising to find the predominant concern is with ethical conduct [and] [t]his theme recurs among cooperative negotiators at all levels of effectiveness.’<sup>433</sup> Further, Williams found that the effective/cooperative attorneys ‘feel constrained in their conduct by a standard of fairness and ethical dealing.’<sup>434</sup> While being ‘ethical’ and ‘honest’ is ranked on the lists of both competitive and cooperative negotiators, it is ranked higher for cooperative negotiators (at 3 and 1 respectively) than for competitive negotiators (at 15 and 11 respectively).<sup>435</sup> This suggests that being ethical and honest is not as highly valued or expected for competitive, effective negotiators and thus deception may be a natural part of this negotiating style. Williams concludes that the results show ‘the unbridgeable gap in perceptions and attitude between competitive and cooperative attorneys.’<sup>436</sup>

What is interesting is that regardless of whether all attorneys are expected to conduct themselves under the prescribed ethics codes, to never lie, and to presumably cooperate with opposing counsel and the courts, there are still distinct differences in what motivates attorneys during negotiations on behalf of their clients. It seems attorneys are implicitly learning their negotiating behaviours outside the explicit rules and codes of conduct that are meant to govern their profession.

#### **2.5.4 Research About Legal Ethics**

The purpose of this section is to present and discuss research related to legal ethics. Prior to discussing research in the area of legal ethics, this section presents a

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<sup>433</sup> Williams, above n 202, 20.

<sup>434</sup> Williams, above n 202, 20-21 (further pointing out that while they want to know their clients’ needs and to try and meet these needs without resorting to litigation, cooperative negotiators are also concerned about maintaining a good personal relationship with opposing counsel).

<sup>435</sup> Williams, above n 202, 26-27.

<sup>436</sup> Williams, above n 202, 25.

brief discussion on Kohlberg's levels of moral development. This information is important because, as discussed earlier, each individual who enters law school does so with a pre-disposed idea of what is right and wrong. Kohlberg's levels of personal moral can aid in understanding the challenges faced by lawyers in adhering to legal ethics codes, the extent to which lawyers may understand and adhere to the demands of the legal ethics codes in the practice of law as well as the extent to which legal education can assist in or detract from further developing a future legal practitioner's stage of moral development. In the context of this thesis, this could mean the ability to distinguish between using deception in negotiation and making alternative, ethically viable choices of negotiation behaviour.

The first step towards resolving the tension between the view of a strictly autonomous moral agent and the professional ethics obligations is to understand Kohlberg's levels of moral development and how they can be applied to better understand the impact of legal ethics codes and how it can influence the future of legal education (especially legal ethics education that is meant to manage attorney behaviour).<sup>437</sup> Understanding Kohlberg's levels of moral development is also important in successfully implementing the ethical standard setting policy reform proposals in Chapter 7. The second important precursor is to realise that, in some instances, if not all, law and morality do intersect<sup>438</sup> and lawyers, as professionals of the legal system, need to be able to manage those issues which fall at the crossroads of law and morality.

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<sup>437</sup> See generally Richards, above n 28, 365-371 (providing a historical perspective of moral development and moral psychology's key developers and discussing Kohlberg's work in detail and its relevance to legal education).

<sup>438</sup> See generally Honoré (2008), above n 115. See also Honoré, above n 115, 1.

Kohlberg's work developed from and followed the basic methodology and research established by Piaget, a noted child development scholar. Kohlberg used extensive samples of data, including cross-cultural samples and statistical analyses of data to test Piaget's findings.<sup>439</sup> Instead of the two-stage moral development process ('ethics of authority' and 'autonomous personal conscience') that Piaget developed,<sup>440</sup> Kohlberg postulated six stages of moral development, with each person moving through the stages systematically and sequentially before achieving higher levels of moral development.<sup>441</sup> The three major levels and six stages of moral development are highlighted below in Table 2.4.

**Table 2.4: Kohlberg's Levels and Stages of Moral Development<sup>442</sup>**

Level / Stage	Applied to Example
<b>Level I – Premoral / Pre-Conventional (children)</b>	
<b>Stage 1</b> – Punishment and obedience orientation (How can I avoid punishment?)	Obey rules to avoid punishment
<b>Stage 2</b> – Naive instrumental hedonism (What's in it for me?)	Conform to and obey rules to obtain rewards, have favours returned, etc.
<b>Level II – Morality of Conventional Role Conformity / Conventional (adolescents and adults)</b>	
<b>Stage 3</b> – Good-boy morality of maintaining good relations, approval by others (Social norms; good-boy/good-girl attitude)	Conform to and obey rules to avoid disapproval or being disliked by others
<b>Stage 4</b> – Authority maintaining morality (legalism) (Law and order morality)	Conform to and obey rules to avoid censure by legitimate authorities and resulting guilt that may be experienced
<b>Level III – Morality of self-accepted moral principles / Post-Conventional</b>	
<b>Stage 5</b> – Morality of contract of individual rights	Value of human life example – Life is

<sup>439</sup> Richards, above n 28, 366-367.

<sup>440</sup> Jean Piaget, *The Moral Development of the Child* (1962) 174, 228.

<sup>441</sup> Richards, above n 28, 367.

<sup>442</sup> Adapted from Richards, above n 28, 367-368; See also Lawrence Kohlberg, 'Moral Development' in *International Encyclopedia of the Social Sciences* (1968) 489-494; Lawrence Kohlberg, 'A Cognitive-Developmental Approach to Moral Education' (1972) *The Humanist* 15;

Level / Stage	Applied to Example
and of democratically accepted law (Social contract orientation)	valued both in its relation to community welfare and as a universal human right
<b>Stage 6</b> – Morality of individual principles of conscience (Universal ethical principles / Principled conscience)	Value of human life example – Life is valued as sacred and as representing a universal human value of respect for the individual.

As seen in the table above, legalism and lawyers would tend to fall under Stage 4 of Kohlberg's model. Stage 5 consists of only 25% of those studied by Kohlberg while he reserves Stage 6 for only 5-10% of individuals who could be considered cultural heroes because they 'achieve the integrity of autonomous ethical individuation from their societies at the expense of their lives (Socrates, Christ, Gandhi, Martin Luther King)'.<sup>443</sup>

An important point by Kohlberg is that as individuals progress to higher stages of moral development, they tend to act more ethically when faced with temptation.<sup>444</sup> People at higher stages also tend to be more honest under temptation and resist outrageous and unjust orders.<sup>445</sup> Of special significance is the finding from Kohlberg's more recent studies that 'conclude that stage 5 is not achieved until age 23, and stage 6 until age 30',<sup>446</sup> both of which are in the range of prime ages of professional education, such as law school or medical school. This is specifically relevant to incoming law students in their first year of law school who tend to fall within the 23-30 year age range. Kohlberg's findings in relation to Stages 4, 5, and 6

<sup>443</sup> Kohlberg, above n 442, 15.

<sup>444</sup> Lawrence Kohlberg and E Turiel, 'Moral Development and Moral Education' in G Lesser (ed) *Psychology and Educational Practice* (1971) 456-461.

<sup>445</sup> Kohlberg and Turiel, above n 444, 456-461.

<sup>446</sup> Richards, above n 28, 369 (citing Lawrence Kohlberg, 'Continuation in Childhood and Adult Moral Development Revisited' in Lawrence Kohlberg and E Turiel (eds), *Moralization, the Cognitive Developmental Approach* (1973) Chapter 45).



indicate that there is great opportunity to either cause moral development *regression* or moral development *progression* depending on how law students are taught the nature of legal ethics and moral reasoning. Given this background, a review of research in the area of legal ethics yields important insights that will be more fully integrated into the policy reform proposals discussed in Chapter 7.

To date, there are relatively few empirical studies on legal ethics; however, the research discussed below provides important insights in furthering the objectives of this thesis. A review of literature in this area (includes professional ethics) yielded four primary and relatively reliable sources of research in this area, each of which is introduced and discussed below.

The first important study in this area is Lamb's late-1990's study. Lamb leveraged Lerman's 1990 anecdotal research in the United States<sup>447</sup> to conduct similar research in Australia. Debra Lamb, with the support of the Australian Research Council and the Queensland Law Society, undertook a study to better understand the types of ethical dilemmas faced by Australian lawyers.<sup>448</sup> The qualitative study consisted of approximately seventeen (17) interviews with barristers and solicitors across Australia who practiced in different areas of law. The sole objective of this study was to obtain realistic examples of the types of ethical issues lawyers face.<sup>449</sup> There was no focus on obtaining a representative sample or to analyse results quantitatively or statistically. The research method consisted of a pre-interview letter that asked respondents to consider at least two specific examples of the types of ethical dilemmas they faced. Prior to the interview, lawyers received a letter that

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<sup>447</sup> Lerman, above n 60, 659.

<sup>448</sup> Debra Lamb, 'Ethical Dilemmas: What Australian Lawyers Say About Them' in Stephen Parker and Charles Sampford, *Legal Ethics and Legal Practice: Contemporary Issues* (1995) 217-234.

<sup>449</sup> Lamb, above n 448, 218.

asked them to identify two problems they considered ‘troubling’. The term ‘troubling’ was defined in the letter as follows:

‘By trouble, I mean trouble your conscience, make you concerned that something unethical is being asked of you, or make you personally worried about the consequences of what you are being asked to do.’<sup>450</sup>

Lamb’s study resulted in more than 80 case studies reflecting the various types of ethical dilemmas faced by Australian lawyers. Lamb placed these findings into six main categories of problems: 1) conflicts of interest; 2) dealings with clients; 3) problems in litigation; 4) relationships with other practitioners; 5) problems within a firm; and 6) conflict with a lawyer’s own morals. The category dealing with conflicts with the lawyer’s own morals seems to show a clear conflict between what the legal ethics of lawyers compels them to do versus what the lawyer as a non-professional member of society would do. For example, while some lawyers appeared to conform to the traditional notion that the lawyer’s personal morals are irrelevant and all moral dilemmas are the client’s issues, these same lawyers were conflicted about following a client’s potentially immoral instructions or determining how best to act in volatile cultural situations where their legal jurisdiction’s legal ethics conflicted with those of the visiting legal jurisdiction.<sup>451</sup> As Lamb found, legal ethics issues are a constant facet of a lawyer’s professional terrain and there is ‘clearly a need for further and for greater attention to be directed to educating lawyers about the types of problems they are likely to face, and to suggest solutions’<sup>452</sup> which do not present a conflict between the professional and non-professional dimensions of lawyers.

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<sup>450</sup> Lamb, above n 448, 218, n 5.

<sup>451</sup> Lamb, above n 448, 233-234.

<sup>452</sup> Lamb, above n 448, 234.

A second important study in the area of legal ethics is Moliterno's 1994-1995 comparative study of graduate preparedness. Professor Moliterno of the William and Mary Law School in the United States undertook a comparative study of law school graduates and their perceived ability and readiness to handle professional ethics issues in practice after completion of their law school education.<sup>453</sup> This study is valuable and relevant in providing an assessment of whether professional ethics courses as they are currently taught, especially at major law schools in the United States, have a positive impact on a law graduate's perceived ability to handle ethical issues in practice.

As explained by Moliterno, the purpose of the study was 'to determine whether a relationship exists between the professional skills and professional ethics curriculum at a law school and the school's graduates' satisfaction with their profession or their perceptions of preparedness for various types of legal practice.'<sup>454</sup> To this end, four law schools, each a state-supported school with records and traditions of excellence,<sup>455</sup> agreed to participate in an extensive survey. Moliterno's William and Mary Law School was one of the four schools as one of Moliterno's informal goals was to assess the unique curriculum structure of his own law school as compared with other law schools.<sup>456</sup>

The study methodology consisted of sending out a total of one thousand surveys distributed evenly across the four participating schools (i.e., 250 surveys at

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<sup>453</sup> See generally, James E Moliterno, 'Professional Preparedness: A Comparative Study of Law Graduates' Perceived Readiness for Professional Ethics Issues' (1995) 58-AUT *Law and Contemporary Problems* 259.

<sup>454</sup> Moliterno, above n 453, 260.

<sup>455</sup> Ibid.

<sup>456</sup> Moliterno, above n 453, 261 (care was taken to ensure there was no bias in terms of finding out the name of the school by respondents or those conducting the survey and an arbitrary reply address was used to prevent disclosure).

each of the four participating schools). The surveys participants were graduates of each school who were randomly selected from the mailing lists provided by the school.<sup>457</sup> Graduates had been in practice between two to five years.<sup>458</sup> Of the 1,000 surveys sent out, 404 surveys were completed and returned, resulting in a response rate of 42.3 percent.<sup>459</sup>

The general legal curricula at all four schools was similar; however the professional skills and professional ethics curricula was unique for Moliterno's William and Mary Law School.<sup>460</sup> While the other three schools required that students complete a professional ethics course, most notably as an upper-level elective and not as a core first-year course, William and Mary Law School's professional ethics and professionals skills course is a required two-year programme designed around 'long-term, comprehensive, simulated client service'<sup>461</sup> where the professional/legal ethics aspects are interwoven into daily experiential learning of what it means to be a lawyer and not just think like one. This notable difference had an impact on the results of the study.

The results of Moliterno's study yielded two key insights, especially with respect to legal ethics education. First, while all four schools were asked to rank the importance of knowledge of substantive law against other items such as legal and professional ethics analysis and legal communications through research and writing, William and Mary graduates ranked knowledge of substantive law below the top three skills versus the other schools which ranked knowledge of substantive law at or near

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<sup>457</sup> Moliterno, above n 453, 261.

<sup>458</sup> Ibid.

<sup>459</sup> Moliterno, above n 453, 262.

<sup>460</sup> Moliterno, above n 453, 262-263.

<sup>461</sup> Moliterno, above n 453, 264 and 264-270 (discussing William and Mary's approach to professional skills and professional ethics education). This is discussed and treated further in Chapter 7.

the top three.<sup>462</sup> Second, the mean preparation scores in the area of professional ethics were 3.61 for the three traditional professional ethics curricula schools and 4.05 for William and Mary graduates.<sup>463</sup> This is a statistically significant difference that appears to point to the conclusion that William and Mary graduates of the intense, two-year experimental professional ethics curricula appear to have greater confidence in their ability to handle the key skills necessary for practice, including the ability to navigate professional and legal ethics issues that may arise.<sup>464</sup>

A third important study in the area of legal ethics is Macfarlane and Manwaring's 2005-2006 study in Canada. Macfarlane and Manwaring conducted a study of the ethics of legal practice in Canada using focus groups and a skills audit. One of the central drivers of Macfarlane and Manwaring's study appears to be the finding that, in Ontario, Canada in particular, there is significant 'concern over professionalism and ethics in the practice of law' because professional ethics remains an 'orphan' of legal education,<sup>465</sup> relegated to the status of being tangentially discussed in substantive law courses or part of non-core or optional courses taken by a minority of students.<sup>466</sup> In developing the skills audit, Macfarlane and Manwaring

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<sup>462</sup> Moliterno, above n 453, 273-274 (discussing the relationship between these results and its consistency with the theory that knowledge of substantive law is the least important according to 90 percent of hiring partners who expect communication skills, analytical skills, and sensitivity to professional ethics issues as primary skills that new lawyers need to bring to practice). See also Lon L Fuller, 'On Teaching Law' (1950) 3 *Stanford Law Review* 35, 36 ('There are certain propositions about legal education upon which, I believe, a consensus exists. There is, for example, an almost universal agreement that our primary object is not to impart information. Whatever it is we want the student to get, it is something more durable, more versatile and muscular, than a mere knowledge of rules of law.'); Erwin N Griswold, 'Law Schools and Human Relations' (1955) *Washington University Law Quarterly* 217, 229-30 ('It is no longer possible for a student to know all the law. Nor is it necessary or desirable.'); Bryant G Garth and Joanne Martin, 'Law Schools and the Construction of Competence' (1993) 43 *Journal of Legal Education* 469, 490.

<sup>463</sup> Moliterno, above n 453, 271.

<sup>464</sup> Moliterno, above n 453, 274-275.

<sup>465</sup> Julie Macfarlane and John Manwaring, 'Reconciling Professional Legal Education with the Evolving (Trial-less) Reality of Legal Practice' (2006) *Journal of Dispute Resolution* 253, 256-257.

<sup>466</sup> Macfarlane and Manwaring, above n 465, 256.

asked a series of key questions about what skills are required of 21<sup>st</sup> century lawyers and how legal education could support the development of those skills.<sup>467</sup> The skills audit undertaken by Macfarlane and Manwaring was based on focus groups and Delphi panels to solicit direct input from Ontario legal practitioners in the cities of Toronto, Windsor, Ottawa and Thunder Bay.<sup>468</sup>

The focus groups and Delphi panels resulted in a taxonomy consisting of six major skills categories: 1) client relationships; 2) managing a client file (dispute resolution); 3) managing a client file (transactions and applications); 4) legal research and writing; 5) practice management; and 6) ethical issues and professionalism.<sup>469</sup> As indicated by the taxonomy, ethics and professionalism is a central concern for practicing lawyers yet this appears to get marginal focus in Canadian legal education.<sup>470</sup> The input from Canadian practitioners was used to help address the issue of the lack of adequate competence in professional ethics as well as the growing gap between the skills gained through formal legal education versus the skills that practicing lawyers of the 21<sup>st</sup> century require given what they actually do in legal practice.<sup>471</sup> In the context of this thesis, Macfarlane and Manwaring's study highlights

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<sup>467</sup> Macfarlane and Manwaring, above n 465, 258-259.

<sup>468</sup> Macfarlane and Manwaring, above n 465, 255-258.

<sup>469</sup> Macfarlane and Manwaring, above n 465, 260.

<sup>470</sup> Macfarlane and Manwaring, above n 465, 263-264 (discussing the results of feedback on professionalism and ethics in particular, especially the ethical challenges as legal work shifts from a more trial focus and how that creates situations for lawyers to be unethical). This section is especially true for lawyers who engage in ADR processes such as mediation and negotiation. In addition, it is noted the situation may be different in Ontario, Canada from the time of this study.

<sup>471</sup> Macfarlane and Manwaring, above n 465, 258. The authors point out that this gap has been studied and seems to be consistent and common in many common law jurisdictions. See also American Bar Association: Section of Legal Education and Admissions to the Bar, *Report of The Task Force on Law Schools and the Profession: Narrowing the Gap (the McCrate Report)* (July 1992) <<http://www.abanet.org/legaled/publications/onlinepubs/maccrate.html>> at 9 August 2010 (United States perspective); General Council of the Bar and the Council of the Law Society, London, *A Time for Change: Report of the Committee on the Future of the Legal Profession (the Marre Report)* (1988) (United Kingdom perspective); Richard Wu, 'Reform of Professional Legal Education at the University of Hong Kong' (2004) 14(2) *Legal Education Review* 153 (Hong Kong perspective).

the importance of ensuring that both legal education, in general, and legal ethics, in particular, evolves with changes in legal practice. This study has merit when analysing the legal ethics codes in Chapter 4, the legal ethics violation cases in Chapter 5, and discussing the policy reform proposals outlined in Chapter 7.

Finally, a fourth important study in the area of legal ethics is Wilkinson, Walker, and Mercer's research initiative. Wilkinson, Walker, and Mercer along with the University of Western Ontario commenced a research initiative in Canada in 1999-2000 to examine 'the effectiveness of codes of ethics in maintaining standards of behaviour within the legal profession in Ontario.'<sup>472</sup> The aim of the study was to determine to what extent Ontario lawyers used the jurisdiction's legal ethics codes for guidance on specific ethical issues, the extent to which the legal ethics codes addressed or hindered their final decision on what action to undertake regarding the specific ethical dilemma, and whether, despite the existence of legal ethics codes, lawyer still relied primarily on independent ethical decision-making.<sup>473</sup>

The researchers interviewed approximately 180 lawyers in Ontario, Canada in four independent centres with the representative sample designed 'to mirror the proportion of practitioners practising in private firms of various sizes in Ontario'.<sup>474</sup> A total of 150 private practitioners and 30 corporate counsels were approached to be part of this study. Each lawyer was interviewed for approximately thirty to forty-five minutes and was asked to discuss certain ethical problems they faced, the extent to

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<sup>472</sup> Margaret Ann Wilkinson, Christa Walker and Peter Mercer, 'Do Codes of Ethics Actually Shape Legal Practice?' (2000) 45 *McGill Law Journal* 645, 645. The Ontario, Canada legal profession is guided by the Law Society of Upper Canada Rules of Professional Conduct. See also The Law Society of Upper Canada (Ontario), *Rules of Professional Conduct (June 2009)* <<http://www.lsuc.on.ca/media/rpc.pdf>> at 9 August 2010.

<sup>473</sup> Wilkinson, Walker, and Mercer, above n 472, 645-653 (discussing the nature of ethical codes as related to this study).

<sup>474</sup> Wilkinson, Walker, and Mercer, above n 472, 653-654.

which they used legal ethics codes for guidance, whether the ethics codes were helpful, and whether they referred to another source of guidance to finally resolve the ethical dilemma.<sup>475</sup> Approximately 86% of lawyers interviewed gave consent for their interview details to be part of the final analysis using a chi-square statistical testing methodology.<sup>476</sup>

In short, the findings showed that only 16% (14/154 respondents) even mentioned the Handbook (Ontario, Canada's legal ethics guide).<sup>477</sup> In addition, only 11 out of the 14 respondents indicated that the Handbook was helpful in determining their ethical obligations in resolving the issue. Further, out of the 11 respondents, three respondents (3) indicated that the Handbook was not effective in resolving the ethical issues that came up in the course of their practice. As a result, the study concluded that only 5% (8/154 respondents) 'found the Handbook to be useful in resolving a specific ethical issue.'<sup>478</sup> The remainder of respondents either did not mention the Handbook as a source of guidance, negatively mentioned the Handbook as helping to resolve their specific ethical dilemma, exercised independent judgment in resolving the ethical dilemma, or solicited the advice of senior attorneys for assistance in resolve the specific ethical issue.<sup>479</sup>

The findings of the Ontario, Canada study seem to indicate that there is room for improvement of the legal ethics codes in Ontario in terms of providing better, effective assistance to lawyers when they face ethical dilemmas in practice. The same

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<sup>475</sup> Wilkinson, Walker, and Mercer, above n 472, 653-655.

<sup>476</sup> Wilkinson, Walker, and Mercer, above n 472, 654

<sup>477</sup> See generally, Law Society of Upper Canada, *Professional Conduct Handbook* (2<sup>nd</sup> ed 1998). This study referred to the Law Society of Upper Canada's *Professional Conduct Handbook* which contains the *Rules of Professional Conduct*.

<sup>478</sup> Wilkinson, Walker, and Mercer, above n 472, 655-656.

<sup>479</sup> Wilkinson, Walker, and Mercer, above n 472, 656-679 (discussing the results in detail and providing edited transcripts of lawyer interviews and ethical issues faced).



could be said of the legal ethics of other jurisdictions as discussed further in Chapter 4. The findings also demonstrate that the majority of lawyers do not actually refer to the legal ethics codes for helpful guidance,<sup>480</sup> implying that modifying legal ethics codes or imposing new rules on ethical conduct *alone* is not likely to influence lawyer behaviour. This appears to be due, in part, to a pre-disposed moral perspective of lawyers as they enter the profession and the perceived self-interested nature of most people, including lawyers.<sup>481</sup>

For the purposes of this thesis, the Ontario, Canada study is important in providing a perspective into the legal regulation reforms proposed in Chapter 7. At best, it confirms that legal regulation and ethics codes do play a role in shaping attorney behaviour in resolving ethical issues. At worst, it sheds light that while legal ethics codes may play an explicit or implicit role in such dilemmas, they are certainly not the main driver in ensuring an integrity-based system of lawyer conduct. The legal regulation reform proposals presented in Chapter 7 take these observations into account in specifically addressing the potentially deceptive behaviour of lawyers in negotiations.

A final noteworthy analysis on the view of ethics, though not specifically legal ethics, is the annual Honesty and Ethics consumer poll conducted by The Gallup

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<sup>480</sup> Wilkinson, Walker, and Mercer, above n 472, 656-679 (discussing the result of the study in Ontario, Canada); Mize, above n 66, 245 (echoing a similar sentiment regarding New Zealand's Rules of Professional Conduct for Barristers and Solicitors in addressing negotiation behaviour by lawyers in New Zealand, '[m]ore guidance needs to be given on acceptable negotiating behaviour'); Rhode, above n 151, 20-21 (discussing the state of the American Bar Association's MPRC and arguing that 'bar ethical codes are not an adequate source of guidance....end up reflecting too high a level of abstraction and too low a common denominator of conduct.').

<sup>481</sup> See, eg, Loder, above n 42, 333 ('the influence which any code may have on lawyer attitudes and conduct may be sorely limited, since moral disposition predates entry into the profession'); T H Morawetz, 'Lawyers and Conscience' (1989) 21 *Connecticut Law Review* 383 ('codes...cannot transform the most callous and self-interested operators into lawyers of conscience. At best, codes and training can activate pre-existing inclinations.'); F C Zacharias, 'Specificity in Professional Ethics Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics' (1993) 69 *Notre Dame Law Review* 223, 386.

Organisation in the United States. Since 1976, The Gallup Organisation has conducted an annual poll asking a select group of random people in the United States to rate the relative honesty and ethics of various professions. Interestingly enough, since 1976, medical doctors and judges have routinely outranked lawyers on the honesty and ethics rating, strongly suggesting that lawyers are not considered to be as honest or ethical as other professions.<sup>482</sup> This view was further confirmed by the 2002 ABA Section on Litigation public perception of lawyers study.<sup>483</sup> These negative ratings appear to get worse the more someone is actively engaged in using a lawyer or legal services. The Gallup polls as well as other professional and consumer studies related to the legal profession are discussed in greater detail in Chapter 6.

In conclusion, the foregoing research in the area of legal ethics appears to demonstrate that while the legal ethics codes are intended to guide lawyer behaviour, they are not as effective as expected in curtailing unethical conduct. Furthermore, while law firms and practitioners regard the ability to manage professional ethics dilemmas as a key skill for 21<sup>st</sup> century lawyers, law schools do not appear to effectively integrate the development of these core skills into mainstream legal education. These insights are important in developing and implementing the integrated policy reform proposals discussed in Chapter 7.

### **2.5.5 Research About Lawyers' Bargaining Behaviour**

As discussed earlier, legal ethics as well as bargaining ethics models may influence a lawyer's bargaining (negotiation) behaviour.

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<sup>482</sup> See generally The Gallup Poll, *Honesty and Ethics Survey – Trend Analysis: 1976 – 2008*. This is on file with the author. A copy is included in the Appendices. See also American Bar Association Section of Litigation, *Public Perception of Lawyers: Consumer Research Findings*, above n 13.

<sup>483</sup> See, eg, Hengstler, above n 13, 60; American Bar Association Section of Litigation, *Public Perception of Lawyers: Consumer Research Findings*, above n 13.

The purpose of this section is to highlight and discuss research related to lawyers' bargaining behaviour. Recent studies into lawyers' negotiation behaviour have generally been based on case studies involving law students given the issues related to research into lawyer's behaviours in negotiation discussed earlier in this chapter.<sup>484</sup> However, the first study discussed below does involve personal injury lawyers.

In 1994, Davis conducted a survey of professional injury solicitors in Queensland, Australia.<sup>485</sup> The purpose of the survey was to determine the attitudes and beliefs of Queensland personal injury solicitors relevant to negotiating behaviours with the goal of interpreting the results in the context of prevailing psychological research in games and decision theory.<sup>486</sup> The research method involved a survey questionnaire which was sent out to 148 solicitors in Queensland specialising in personal injury litigation.<sup>487</sup> Each survey questionnaire contained sixteen (16) statements specific to personal injury litigation and negotiation.<sup>488</sup> Respondents were asked to indicate the degree to which they agreed or disagreed with each of the sixteen (16) statements. To eliminate bias and ensure confidentiality, surveys were sent unmarked with a reply-paid envelope and the results were tabulated by an external tabulator.<sup>489</sup>

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<sup>484</sup> See Chapter 2, section 2.5.1 (Introduction) for a detailed discussion on this topic.

<sup>485</sup> Note: It is noted that the negotiation practices of personal injury lawyers today, at the time of this thesis, may be different from those discussed in this 1994 study. However, the study provides valuable insight into the negotiation practices of a distinct subset of lawyers. See, eg, *Legal Services Commissioner v Mullins* [2006] LPT 012, a recent Queensland jurisdiction legal ethics case discussed more fully in Chapter 5 which involves a personal injury barrister whose negotiation behaviour appears to reinforce the findings of Davis' 1994 study.

<sup>486</sup> See generally Davis, above n 126.

<sup>487</sup> Davis, above n 126, 735.

<sup>488</sup> Ibid.

<sup>489</sup> Ibid.

Of the 148 surveys sent, 105 respondents replied for an overall response rate of 71%. Out of the 105 completed surveys, 58 respondent-lawyers represented mainly plaintiffs while 41 respondent-lawyers primarily acted for defendants. Among the various attitudes and beliefs about negotiation by personal injury lawyers, Davis found that ‘most plaintiffs are highly motivated towards settlement early in the action, and again shortly prior to trial.’<sup>490</sup> Conversely, defendants ‘start [ ] low and build [ ] with increasing proximity to trial.’<sup>491</sup> The findings from this survey also support the research on prospect theory which argues that plaintiffs tend to be risk-averse in a potential gains scenario and defendants tend to be risk-takers in the same situation.<sup>492</sup>

In the context of this thesis, the survey asked respondents to assess statements related to the role of exaggeration and misrepresentation which, as has been established above, are both considered to be acceptable deception tactics in negotiation. Davis found that twenty-four percent (24%) of both plaintiff and defendant lawyers used exaggeration and considered it ‘normal’ when indicating that ‘an offer was “the last offer”’.<sup>493</sup> This represents nearly 50% of all respondents. Davis also found that nearly thirty-six percent (36%) of plaintiff lawyers and thirty-nine percent (39%) of defendant lawyers felt that ‘it was often necessary to misrepresent the strengths of your position to get a good negotiated result.’<sup>494</sup>

Statistically, these results, on their own, are not necessarily conclusive to assert that plaintiff or defendant lawyers are prone to exaggeration or misrepresentation to the extent of being actionably deceptive; however, it is arguably

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<sup>490</sup> Davis, above n 126, 748.

<sup>491</sup> Ibid.

<sup>492</sup> Davis, above n 126, 748. See also Kahneman and Tversky, above n 265, 263-291.

<sup>493</sup> Davis, above n 126, 746.

<sup>494</sup> Ibid.

significant that so many of them feel the need to use these tactics or that such tactics are ‘common’ in order to represent their clients in the context of personal injury negotiations.<sup>495</sup> As Davis points out, ‘many assert that there is a difference between exaggeration, misrepresentation, and deception’<sup>496</sup> in such negotiations, leading one to preliminarily conclude that although most lawyers or clients might see exaggeration (puffing) and misrepresentation as deceptive, the lawyers in this study consider it acceptable within the distributive bargaining context of personal injury negotiations, where a win-lose mentality is the primary *modus operandi* and one party seeks to ‘maximise the pay-out’ while the other party seeks to minimise it.<sup>497</sup>

A second study on legal negotiation occurred approximately two years later. Rachlinski’s 1996 experiment attempted to demonstrate the framing theory of ordinary litigation as it might apply to lawyers and the legal profession. Rachlinski’s study involved a copyright problem given to law students. In this study, half of the students played defendants and the other half played plaintiffs.<sup>498</sup> In the hypothetical copyright problem, plaintiff-subjects could either accept a \$200,000 settlement offer by the defendant or face a 50% chance of winning \$400,000 at trial (and a 50% chance of winning nothing).<sup>499</sup> Defendant-subjects could either pay a \$200,000 settlement to the plaintiff or face a 50% chance of losing \$400,000 at trial (and a 50% of losing nothing).<sup>500</sup> In this scenario, the rational choice theory predicts that both plaintiffs and defendants would be either indifferent to both options (risk-neutral) or

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<sup>495</sup> See eg, *Legal Services Commissioner v Mullins* (2006) (legal ethics case discussed in detail in Chapter 4)

<sup>496</sup> Davis, above n 126, 747.

<sup>497</sup> Davis, above n 126, 734.

<sup>498</sup> Rachlinski, above n 269, 113.

<sup>499</sup> Ibid.

<sup>500</sup> Ibid.

would prefer settlement (risk-averse).<sup>501</sup> However, Rachlinki found that, consistent with the framing theory, 77% of plaintiff subjects preferred settlement (risk-averse) while 69% of defendant-subjects preferred trial (risk-seeking).<sup>502</sup>

A third study on legal negotiation behaviour worth noting is Guthrie's study involving the frivolous framing theory. In 2003, Guthrie conducted a similar study to demonstrate the frivolous framing theory of litigation behaviour.<sup>503</sup> Frivolous litigation is litigation without merit on the basis of law or fact that unnecessarily consumes the valuable resources of the legal system.<sup>504</sup> Guthrie's scenario involved a sample litigation problem given to law students. Half of the students played defendants and the other half played plaintiffs.<sup>505</sup> Plaintiffs were given the option to either accept a \$50 settlement payment or face a 1% chance of winning a \$5,000 judgment at trial.<sup>506</sup> Similarly, defendants could either pay a certain \$50 settlement to the plaintiff or face a 1% chance at having to pay a \$5,000 judgment at trial.<sup>507</sup> Once again, the economic theory of suit and settlement (rational choice theory) predicts that

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<sup>501</sup> Guthrie, above n 265, 1121-1122. See also Chapter 2, section 2.3.7 (Decision-Making Theories Affecting Legal Negotiation) for more information on these various decision-making theories.

<sup>502</sup> Rachlinski, above n 269, 128-129.

<sup>503</sup> See Chapter 2, section 2.3.7 (Decision-Making Theories Affecting Legal Negotiation) for more information on these various decision-making theories.

<sup>504</sup> Guthrie, above n 265, 1115; See also John Lande, 'Failing Faith in Litigation? A Survey of Business Lawyers' and Executives' Opinions' (1998) 3 *Harvard Negotiation Law Review* 1, 26 (1998) (reporting that 53 percent of inside counsel and 14 percent of outside counsel in his survey believe that *more than half* of the cases filed against businesses are frivolous); Robert G Bone, 'Modeling Frivolous Suits' (1997) 145 *University of Pennsylvania Law Review* 519, 520 ('[T]here is widespread belief that frivolous litigation is out of control. Many people cite frivolous suits as the cause of the litigation system's most serious ills-huge case backlogs, long delays and high trial costs.');

Valerie P Hans and William S Lofquist, 'Jurors' Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate' (1992) 26 *Law and Society Review* 85,95 (1992) (reporting survey results showing that 83 percent of jurors in cases involving business defendants either 'agree' or 'strongly agree' that there are far too many frivolous lawsuits)

<sup>505</sup> Chris Guthrie 'Framing Frivolous Litigation: A Psychological Theory' (2000) 67 *University of Chicago Law Review* 163, 188-189.

<sup>506</sup> Guthrie, above n 505, 188-189.

<sup>507</sup> Guthrie, above n 265, 1124 (discussing the frivolous framing theory informal study)

both the plaintiffs and defendants would be either indifferent (risk-neutral) or prefer settlement (risk-averse).<sup>508</sup>

The results of this study indicated that, contrary to the economic theory of suit and settlement yet consistent with the frivolous framing theory, 62% of plaintiff-subjects preferred a trial (a risk-seeking option).<sup>509</sup> In addition, 84% of the defendant-subjects preferred settlement (a risk-averse option) where both parties are faced with low-probability gains or losses.<sup>510</sup>

In summary, each of these studies on how lawyers might behave in litigation and negotiation is important to the issues discussed in this thesis. For example, both the framing theory of ordinary litigation and the frivolous framing theory of litigation behaviour can be used to potentially predict the possibility of lawyers using deception in negotiation based on the lawyer's perception of whether using deception in negotiation is a risk-seeking or risk-averse option at a given point in the negotiation. Furthermore, the foregoing research can be used to effectively define and implement the policy reform proposals discussed in Chapter 7.

#### **2.5.6 Research About Lawyers' Bargaining Behaviour and Ethics**

Empirical research concerning a lawyer's potentially unethical behaviour in negotiation is generally focused on law review articles and views from legal scholars and ethicists on whether lawyers fulfil their ethical obligations or how they should fulfil those obligations. However, this area is becoming more critical given a global

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<sup>508</sup> Guthrie, above n 265, 1124.

<sup>509</sup> Guthrie, above n 505, 188-189.; See also Chris Guthrie et al, 'Inside the Judicial Mind' (2001) 86 *Cornell Law Review* 777 (discussing the results of an informal study of federal judges and magistrates in settling a simple copyright dispute in light of the prospect theory).

<sup>510</sup> Guthrie, above n 505, 188-189.

economy, cross-national legal jurisdictions, and the changing role of the legal profession in this global world.

The relatively few comments on this topic have focused less on lawyers' potentially unethical behaviour than on the potential impact of using ethically ambiguous tactics in a negotiation. They are worth noting here to the extent that the impact may be more or less consistent in a legal negotiation setting. In addition, the research provides insight into the factors which may influence the lawyer's decision to use deception in negotiation or engage in other conduct that may violate the legal ethics code of a given jurisdiction.

In 1991, Lewicki et al found that 'where there is a likelihood of a future long-term relationship with the other party, negotiators are less likely to endorse marginally ethical tactics.'<sup>511</sup> Later, in 1999, Lewicki et al went on to identify five contextual factors which play a role in a model of ethical decision making, including: '1) relationship with the other party; 2) the relative power of the negotiators; 3) whether or not the negotiator is acting as an agent;<sup>512</sup> 4) the group and the organisational norms; and 5) the cultural norms'.<sup>513</sup>

There have also been some consistent findings in negotiation literature with regards to the differences in men and women on the topic of using ethically ambiguous negotiation tactics (EANTs), such as deception. Generally it appears that women are less accepting of EANTs than men and older people disapprove of EANTs

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<sup>511</sup> Roy J Lewicki and G Spencer (1991) *Ethical relativism and negotiating tactics: Factors affecting their perceived ethicality* (Paper presented at the Academy of Management, Miami, Florida).

<sup>512</sup> See, eg, Norman Bowie and R Edward Freeman, *Ethics and Agency Theory* (1992) (noting that 'when people act as an agent they may be more willing to violate personal ethical standards.').

<sup>513</sup> See generally Roy J Lewicki, David M Saunders, and John W Minton, *Negotiation* (3<sup>rd</sup> ed, 1999).



relative to younger people.<sup>514</sup> Banas and McLean-Parks conducted a study of MBA students and found that ‘negotiators classified as ideologically ‘absolutist’ (would assume the best outcome can be achieved by following universalist principles) were less accepting of EANTs than those who were classified as ideologically ‘subjectivist’ (negotiators who base decisions on personal values and perspectives)’.<sup>515</sup> Finally, Rivers stated that determining the use of appropriate negotiation tactics in an international business environment is critical since a negotiator using a tactic that might be considered unethical by the other party results in ‘the perpetrator...[feeling] distraught, personal stress or even guilt, and the receiver...likely to be angry, embarrassed and most victims...likely to seek retaliation and revenge’.<sup>516</sup>

Aquino studied the impact of an ethical climate on the use of deception during negotiation is especially salient.<sup>517</sup> Aquino hypothesised the following: 1) that if there was an ethical organisational climate, negotiators would use less deception; 2) that if there was an ethical organisational climate, negotiators would be better perceived as honest; and 3) that those negotiators perceived as honest due to the ethical climate would also achieve a less personally favourable outcome than those not in a similar situation.<sup>518</sup> Aquino studied the effects of face-to-face negotiations in which participants were required to come to a negotiated agreement between supplier

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<sup>514</sup> See, eg, R J Volkema, ‘Ethicality in negotiations: An analysis of perceptual similarities and differences between Brazil and the United States’ (1999) 45(1) *Journal of Business Research* 59-67; R J Volkema, ‘Demographic, cultural, and economic predictors of perceived ethicality of negotiation behavior: A nine-country analysis’ (2004) 57 *Journal of Business Research* 69-78; Robinson, Lewicki, and Donohue, above n 332, 649-664.

<sup>515</sup> Rivers, above n 77, 5 (citing J T Banas and J McLean-Parks, ‘Lambs among lions? The impact of ethical ideology on negotiation behaviours and outcomes’ (2002) 7(2) *International Negotiation* 235-262).

<sup>516</sup> Rivers, above n 77, 4 (citing Lewicki, Saunders, and Minton, above n 513).

<sup>517</sup> See generally Karl Aquino, ‘The effects of ethical and the availability of alternatives on the use of deception during negotiation’ (1998) 9(3) *The International Journal of Conflict Management* 195-217.

<sup>518</sup> See generally Aquino, above n 517, 195-217; See also Sue Fitzmaurice, *The Mediator and Ethics: Searching for the Wisdom of Solomon* <<http://www.windeaters.co.nz/publications/ethics/mediation%20ethics.pdf>> at 9 August 2010.

and buyer. Aquino found the following: 1) that a knowledge of one's ethical organisational climate decreased the use of deception; 2) those negotiators who behaved honestly were perceived as honest by the other party and those behaving dishonestly were so perceived by the other negotiator; and 3) that the honest negotiator's negotiated agreement price with the supplier (\$25.80) was more than that achieved by the dishonest negotiator (\$23.75),<sup>519</sup> with the latter presumably having achieved the better deal. Aquino's study appears to demonstrate that 'when ethical standards are highly salient, negotiators were significantly less likely to use deception, even when there were strong individual incentives to act otherwise.'<sup>520</sup>

A final relevant study in this area involved law students and consisted of demonstrating the applicability of prospect and framing theory discussed above on a legal professional's ethical conduct. As previously indicated, legal scholars have argued that prospect theory is highly relevant to the legal profession in multiple areas.<sup>521</sup> In an effort to test the effect of framing theory on an issue of professional responsibility, Rachlinski gave subject-participants (law students) a hypothetical products liability litigation problem.<sup>522</sup> Student-participants assumed the role of counsel for the defence for a pharmaceutical company. In the hypothetical, subject-participants were informed of the following additional facts: 1) the plaintiffs were parents of a child injured by a product manufactured by the defendant-company; 2) the plaintiffs had already offered to settle the case for \$3 million; 3) unknown to the plaintiffs, the defence had discovered and withheld during discovery certain relevant

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<sup>519</sup> See generally Aquino, above n 517, 195-217; Fitzmaurice, above n 518, 2-3 (discussing Aquino's study).

<sup>520</sup> Rivers, above n 77, 6 (citing Aquino, above n 517).

<sup>521</sup> See, eg, Rachlinski, above n 269, 113; Guthrie, above n 265, 1115.

<sup>522</sup> See Rachlinski, above n 269, 113.

documents which would prove incriminating to the defendant-company.<sup>523</sup> Subject-defence counsel also learned that, if they agreed to settle the case without disclosing the documents to the plaintiffs, they might be sanctioned as having acted unethically under the jurisdiction's professional ethics code.<sup>524</sup>

Rachlinski assigned two distinct scenarios to the subject-participants (acting as counsel for the defendant). One-half of the subject-participants were assigned to a 'gains' scenario in which they were told that their client, the pharmaceutical company, had expected to pay \$5 million to settle the case and so thought that the case was 'going well' given the plaintiffs only wanted \$3 million to settle the case.<sup>525</sup> The other half of the subject-participants were assigned to a 'loss' scenario where the client thought that the case was 'going poorly' because they only expected to pay \$1 million to settle whereas the plaintiffs were asking for \$3 million in settlement.<sup>526</sup> Rachlinski then asked the student-participants in both groups to advise whether they would accept the plaintiff's settlement offer given this information.

Rachlinski found that the results were consistent with the framing theory even though both groups faced the same option to settle the case. Rachlinski found that only 12.5% of those assigned to the 'gains scenario' would engage in an ethically risky prospect of settling prior to disclosing the incriminating documents.<sup>527</sup> In contrast, approximately 45% of those in the loss scenario indicated they would settle without disclosing the documents which were incriminating to their client, presumably because they felt their client would be even less satisfied with the

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<sup>523</sup> Ibid.

<sup>524</sup> Ibid.

<sup>525</sup> Ibid.

<sup>526</sup> Ibid.

<sup>527</sup> Ibid.

progress of the case than they already were.<sup>528</sup> Consistent with prospect theory, Rachlinski found that those facing actual or perceived losses were more likely ‘to adopt a risk-seeking, and ethically dicey, litigation strategy’.<sup>529</sup>

### **2.5.7 Research About Lawyers’ Bargaining Behaviour and Deception**

While the research discussed in Chapter 3 indicates that lawyers engage in deceptive behaviour in negotiations, there is little quantitative empirical research into lawyers’ deceptive behaviour in bargaining that statistically supports the qualitative findings of such behaviour. However, it is widely acknowledged that there are ‘routine occurrences of deception in negotiation’<sup>530</sup> yet there is also ‘little agreement among experts on the extent to which deception is appropriate.’<sup>531</sup>

For example, some suggest that deception is an integral part of the negotiation process<sup>532</sup> while others seem to categorically dismiss deception as necessary, even in negotiation and particularly where lawyers are concerned.<sup>533</sup> Others have targeted certain types of deception as acceptable while outright lies are unacceptable. For example, Wokutch and Carson argue that while deception in negotiation may be normal, it is worse to lie about an issue ‘which the other parties have a right to know

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<sup>528</sup> See Rachlinski, above n 269, 113. This also appears to demonstrate that the way the scenario is initially framed triggers the subjects to be anchored to that perspective and impacts the way they make a decision. Again, a person’s heuristics and biases come into play and affect their perceptions and judgments in every negotiation setting. The use of deception would seem to only heighten such biases and judgments.

<sup>529</sup> Guthrie, above n 265, 1142 (discussing Rachlinski’s study results).

<sup>530</sup> Schweitzer and Croson, above n 326, 226.

<sup>531</sup> Ibid.

<sup>532</sup> See, eg, Albert Carr, ‘Is business bluffing ethical?’ 46(1) *Harvard Business Review* 143-153; White, above n 60, 929; Lax and Sebenius, above n 99, 491-498; R E Wokutch and T L Carson, ‘The ethicality and profitability of bluffing in business’ in Roy J Lewicki, John A Litterer, David M Saunders and John W Minton (eds) *Negotiation* (1993) 499-504.

<sup>533</sup> See, eg, White, above n 60, 926; Carr, above n 532, 143-153. Cf Wetlaufer, above n 31, 1219; Reed Elizabeth Loder, ‘Moral Truthseeking and the Virtuous Negotiator’ (1994) 8 *Georgetown Journal of Legal Ethics* 45; Rubin, above n 69, 577.

than one about which they have no right to know'.<sup>534</sup> Of course the dilemma here seems obvious in that there is no clear agreement on who determines the parties' right to know something and how one determines what is necessary to know versus something that might appear irrelevant. Bluffing in negotiation is rated as acceptable to some<sup>535</sup> yet frowned upon by others.<sup>536</sup>

One deceptive practice, lying about one's reservation price, appears to be an acceptable tactic by most scholars. Anton argued that while lying about one's reservation price is acceptable, fabricating material facts is unethical. Lewicki and Stark indicated a similar notion and said that lies about material facts are 'inappropriate'<sup>537</sup> and later asserted that while lies about reservation prices are still acceptable, lies about material facts are 'unacceptable'.<sup>538</sup> Once again, there are likely several issues in determining what may be considered a material fact or whether something that is not considered a material fact at one point is later a very relevant fact as negotiations draw to a close.

In summary, this section has provided a review of literature into existing research and commentary regarding legal negotiation, the use of deception in negotiation, and the impact of ethics in negotiation. The next section continues with a critical analysis and evaluation of the literature review.

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<sup>534</sup> Wokutch and Carson, above n 532, 502.

<sup>535</sup> See, eg, Carr, above n 532, 143-153. It is important to note that Carr speaks about bluffing in the business context and since the publication of this article, even business demands greater ethics in this area. As well, the question is whether his permissive view of bluffing in business can or should apply to lawyers and the legal profession.

<sup>536</sup> See, eg, J Gregory Dees and Peter C Crampton, 'Shrewd Bargaining on the Moral Frontier: Toward a Theory of Morality in Practice' (1991) 1(2) *Business Ethics Quarterly* 1; Roger Fisher, William Ury and Bruce Patton, *Getting to Yes: Negotiating Agreement Without Giving In* (2<sup>nd</sup> ed 1991); Lewicki and Stark above n 330, 69-95; R J Lewicki and R J Robinson, 'Ethical and unethical bargaining tactics: an empirical study' (1998) 17 *Journal of Business Ethics* 665-682.

<sup>537</sup> Lewicki and Stark above n 330, 69-95; Strudler, above n 67.

<sup>538</sup> See, eg, Lewicki, Saunders, and Minton, above n 513; Lewicki and Robinson, above n 536, 665-682.

## **2.6 CRITICAL ANALYSIS OF LITERATURE REVIEW**

The purpose of this section is to provide a critical evaluation of the findings of the literature review, including strengths and weaknesses of existing research and potential gaps in the research. In addition, this section describes how this thesis and the results of a detailed enquiry into the research questions attempts to close some of these gaps and thus provide an original and valuable contribution to the field.

### **2.6.1 Summary of Findings**

In the early 1980s, one law professor referred to ‘the major unstudied variable in the justice of the legal system – the patterned behaviour of individual lawyers.’<sup>539</sup> In attempting to address the research questions, the issue of the patterned behaviours of legal professionals with regard to alleged deceptive conduct in negotiation is still a major unstudied variable. The literature review in this chapter demonstrates several key findings related to the research problem and research questions outlined in Chapter 1. First, there is a plethora of literature on negotiation both as a process and in terms of negotiation strategies and tactics. In addition, while there is ever-increasing literature on legal negotiation, guidance on the ethics of legal negotiation still appears to be in its infant stages. As such, legal practitioners, when looking for guidance on appropriate negotiation behaviour and ethics, are more likely to be influenced by the pervasive and growing body of work on general negotiation in business and the customary negotiation practices of a given jurisdiction than by explicit guidelines on ethical negotiation behaviour as provided by legal professional associations.

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<sup>539</sup> Condlin, above n 4, 227 n 10.

Second, there is insufficient attention to the types of tactics considered appropriate or not appropriate in legal negotiation. Law and legal scholars seem to have adopted the views of business scholars in regards to negotiation tactics, perhaps as a result of the lack of more credible information about how lawyers ought to conduct negotiations in their professional capacity. This seems to be reflected in current literature. Existing literature, which discusses negotiation strategies and tactics used by lawyers as well as some ‘ethically ambiguous negotiation tactics’ would benefit from a more clearly defined structure that would make it user friendly to legal practitioners in particular. By this I mean that negotiation courses in a faculty of law could implement, for example, a comparative analysis of the strategies and tactics lawyers can use in negotiations and addressing the ethical implications of lawyers violating the legal ethics code. This is especially important because, as discussed earlier, lawyers are considered public servants and therefore have a higher ethical obligation than business persons with regards to acceptable conduct, such as the use of deception in negotiation.

Third, while there is discussion on the ethics of negotiation for lawyers, this appears to be fairly recent. Much of the debate regarding negotiation ethics for lawyers is centred on legal ethics rules, their applicability and their effectiveness. Bargaining ethics models have been proposed though it is not clear that one model has been adopted by legal practitioners to the exclusion of others since it is similarly unresolved whether negotiation even needs a separate code of ethics. As the review and analysis of various legal ethics codes in Chapter 4 appear to indicate,<sup>540</sup> the treatment and focus of negotiation as a distinct function central to the lawyer’s day-to-

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<sup>540</sup> See Chapter 4 (Efforts by Professional Ethics Codes to Regulate Deceptive Behaviours in Negotiation) for more information.

day practice is not consistently addressed in the same vein as, for example, the role of the lawyer as a judge or third-party neutral (mediator).

A fourth observation from the literature review is central to the question of the use of deception in negotiation by lawyers. The legal system, at least in the United States, appears to still embrace White's view that it is necessary for a lawyers to deceive in negotiation if they are to properly do their job and be successful.<sup>541</sup> As discussed further in Chapter 4, White's argument regarding acceptable deception in negotiation is reflected, for example, in the language of Rule 4.1 of the American Bar Association Model Rules of Professional Conduct as well as the formal opinion of the American Bar Association Standing Committee on Ethics and Professional Responsibility.<sup>542</sup> Even in the midst of opinions to the contrary,<sup>543</sup> the legal system, at least in the United States, appears to cling to this empirically unsupported proposition, dismissing the possibility that a negotiation can be successful without use of deception.<sup>544</sup>

Finally, the literature review appears to demonstrate that while there are books and articles written about negotiation for lawyers, it is still arguable whether

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<sup>541</sup> White, above n 60, 928 (misleading other side is the essence of negotiation and is all part of the game); See also American Bar Association Standing Committee on Ethics and Professional Responsibility, 'Formal Opinion 06-439: Lawyer's Obligation of Truthfulness When Representing a Client in Negotiation: Application to Caucused Mediation' 4-6 (April 12, 2006) (reaffirming the use of certain kinds of deception in negotiation).

<sup>542</sup> See generally Formal Opinion 06-439, above n 541, 4-6.

<sup>543</sup> See, eg, Fisher, Ury, and Patton, above n 536 (advocating for principled-negotiation instead of adversarial negotiation approach).

<sup>544</sup> See also Formal Opinion 06-439, above n 541, 4-6 (discussing certain cases where intentional misrepresentation would be considered unethical). Despite these discussions, the American Bar Association still condones certain levels of deception in negotiation. It is important to note that most of the other common-law jurisdictions which were the focus of this study (except Canada) do not explicitly or implicitly address acceptable or unacceptable negotiation behaviour in their legal codes and therefore, I cannot comment on them specifically except that one could presume that either general business or customary negotiation practices are acceptable unless otherwise indicated. See also Avnita Lakhani, 'Deception as a Negotiation Tactic: A Study of the Views and Perceptions of Practitioners' *Update* (October 2009). This article is also published in the Spring 2010 issue of *Rutgers Conflict Resolution Law Journal*.



negotiation is a separate function of the legal professional. It does not appear to be subject to the same level of scrutiny as mediation, arbitration or litigation with its own set of rules and ethics codes. In general, law appears to see negotiation as a skill rather than as a separate activity or function of the lawyer deserving of unique mention.<sup>545</sup> As such, articulated empirical research into legal negotiations is rare given the legal rules, codes of conduct and professional responsibility privileges which form a strong part of a lawyer's professional practice and are expected to provide sufficient guidance.

In terms of this thesis, the findings of this literature review revealed several strengths, weaknesses and gaps. These are discussed in the following sub-sections.

### **2.6.2 Strengths**

The literature review revealed four principle strengths of the current state of knowledge in the areas and disciplines which are the focus of this thesis. First, there appears to be a resurgence of interest in the behaviours of legal professionals and ethics, especially in the area of negotiation ethics. Perhaps driven by the continued negative perceptions and press concerning lawyers' conduct, there has been a surge of discussion and debate about the need for fairness and truthfulness in negotiations and the need for more candour in negotiations.<sup>546</sup> This resurgence demonstrates the timeliness of this thesis and the importance of having a comprehensive foundation upon which to address such complex issues as the use of deception in negotiation.

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<sup>545</sup> Note: This is an arguable observation. It is duly noted that the American Bar Association does discuss negotiation though not necessarily as a separate function. Furthermore the ABA lists negotiation as a fundamental skill of a lawyer.

<sup>546</sup> See, eg, Carrie Menkel-Meadow and Michael Wheeler (eds), *What's Fair: Ethics for Negotiators* (2004); Andrea Kupfer Schneider and Christopher Honeyman (eds), *The Negotiator's Fieldbook: The Desk Reference for the Experienced Negotiator* (2007) (containing chapters discussing ethics, fairness, and morality in negotiation).

A second strength of existing literature is that much of the recent literature and commentary acknowledges the changing aspects of the legal profession which, in turn, requires renewed assessment of how best to support the legal profession in adapting to these changes. The profession of law has traditionally been focused on public service ahead of personal and professional gains even as it is also recognised as one's livelihood.<sup>547</sup> However, the profession has increasingly become more like a business, with a focus on profits, efficiency, and serving customers.<sup>548</sup> Globalisation has only made the legal profession more competitive, cross-national, and multi-jurisdictional. Furthermore, the increased evolution and integration of developing countries into the rule of law paradigm as well the increased use of technology in the courtroom means that the legal profession is poised to significantly evolve even further in the next few years. This rapid evolution from a public service profession to a client-driven business and service-provider for profit has serious implications for how legal rules and ethics will ensure that the legal system stays viable and trustworthy in the eyes of its citizens and for the benefit of the public interest.

A third strength of the literature review is increased acknowledgment and appreciation of the value of social sciences methodology and empirical research as integrated into law teaching. The legal academic world is embracing empirical research (qualitative and quantitative) as adding value to the profession, academia, and the knowledge base from which to improve the practice of law. The increased integration of social science research methodology as well as cross-disciplinary

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<sup>547</sup> See, eg, Davis, above n 171; Derek Bok, 'Access to Justice: The Social Responsibility of Lawyers: Markets and Mindwork' (2002) 10 *Washington University Journal of Law & Policy* 1; Brandeis, above n 182; Anthony Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (1995).

<sup>548</sup> See, eg, Laurel S Terry, 'The Future Regulation of the Legal Profession: The Impact of Treating the Legal Profession as "Service Providers"' (2009) (Penn State University ~ Dickinson School of Law Legal Studies Research Paper No. 01-2009) <<http://ssrn.com/abstract=1304172>> at 9 August 2010.

research from the fields of, for example, business, economics, psychology, and negotiation, demonstrates the importance of future legal research being multi-disciplinary.

Finally, the continued breadth, depth, and diversity of literature on negotiation demonstrate that it is a vital and important process, especially to legal professionals. However, it is still viewed primarily as a skill and not a separate function. The profession would benefit more dialogue on the nature of legal negotiation, greater education of the bargaining ethics surrounding legal negotiation and the potential impact of deception in negotiations. This is still a relatively unstudied area which affects public perceptions and public interest.

In the context of this thesis, the strengths of the literature review provide a foundation from which to address each of the three principle research questions and establish the foundations for recommending the policy reform proposals in Chapter 7. At the same time, the weaknesses of the literature review limit the extent to which conclusions can be drawn. Nevertheless, weaknesses in the literature review also provide an opportunity to address some of the gaps in the context of this thesis and to establish an analytical framework which may be used in future research across multiple jurisdictions.

### **2.6.3 Weaknesses**

There are five major weaknesses of the existing literature in the context of this thesis. Many of these are consistent with prior discussions on the issues of conducting research into legal negotiation as well as the institutional and methodological obstacles of empirical research into the area of negotiation area given the constraints of the legal system.

A principal limitation is the lack of empirical research on legal negotiation. Apart from Williams' long-term study into legal negotiation,<sup>549</sup> there is relatively little formal empirically-based research using a validated social sciences methodology that looks into the negotiation behaviours of legal professionals. While there are experiments that attempt to predict how lawyers are likely to act in negotiations, these studies generally involve students in law or business. Consequently, the results could be criticised for lack of generalisability to actual legal professional behaviour while social science researchers are likely to question its validity on the basis of research methods, sample size, data collection and data analysis.

A second weakness of existing literature is a lack of sufficient research into what is ethically permissible in legal negotiation as different from business negotiation or other types of negotiations. As discussed, negotiation as practiced by lawyers appears to be constrained by the rules and codes of conduct imposed on the profession of law, at least as indicated on the face of the applicable rules and codes of conduct. Given the view of negotiation as a skill rather than a function for the legal professional, the lack of a distinct body of research in this area may seem appropriate; however, this is arguable especially if negotiation is a critical daily skill for lawyers and the public perception of lawyers continues to be negative.

A third weakness is that there is a less than comprehensive understanding about the nature of ethics, legal ethics, and bargaining ethics and how they affect a lawyer's negotiation behaviour as well as the extent to which deception is allowed and acceptable in the context of the legal system. Legal professionals have multiple and, at times, conflicting duties of loyalty which place them in ethical dilemmas. These

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<sup>549</sup> See generally Williams, above n 202. Even this study is arguably not sound from a methodological perspective since self-reported behaviour is subject to researcher and subject bias.

same duties combined with the universal practice of negotiation in so many contexts (formal and informal) are a basis of scholarly and professional debates on the merits of imposing candour in negotiations versus acknowledging the fact that deception in negotiation cannot be regulated and the costs of imposing candour are too great at best and unknown at worst.

A fourth potential weakness, though this may simply be an inevitable and normal function of separate legal jurisdictions, consists of apparent inconsistencies between legal jurisdictions in how the legal ethics codes treat negotiation and the use of deception in negotiation. For example, while arguably the United States has taken a more comprehensive look at the extent to which a certain level of deception is allowed in legal negotiations, Australia does not appear to allow this distinction in its ethics code.<sup>550</sup> Presumably any level of deception in Australia is an ethics violation. In addition, while the United States does not have a separate code of ethics for lawyers as negotiators, a Canadian province does see negotiation as a separate function of the legal professional subject to a separate code of ethics.<sup>551</sup>

Finally, a fifth potential weakness is the subjective nature in which many ethics violations cases are determined where there does not appear to be a clear understanding in the law/negotiations/ethics arena for proper decision-making on ethical issues such as deception in negotiation. Though some scholars have proposed an ethical decision making model, this has not been formally adopted by the legal profession or recognised by a majority of negotiators.<sup>552</sup> As a result, courts and

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<sup>550</sup> Note: This is further discussed in Chapter 4.

<sup>551</sup> Note: This is further discussed in Chapter 4.

<sup>552</sup> See, eg, Loder, above n 533, 45 (discussing a moral problem-solving approach to be used during negotiations which would obviate the need to use deception); Norton, above n 19, 270-298 (presenting

disciplinary tribunals appear to make subjective assessments about the gravity of conduct violations and the punishment imposed in relation to the offending conduct.<sup>553</sup> From a practical standpoint and even with the existence of ethics advisory opinions, a lack of such guidelines might leave a lawyer stranded when it comes to making ethical decisions.

#### **2.6.4 Gaps in the Literature Review/Research**

The gaps in the literature with regards to the research questions and the focus of this thesis can best be summarised as follows.

First, while legal ethics codes are a constant in a lawyer's professional life, there appears to be a lack of comprehensive understanding of the ethics governing the lawyer as a professional and the ethics of the clients he/she is meant to serve. In essence, there is a gap in the legal ethics codes of specific rules or guidelines that assist the lawyer in choosing between appropriate courses of action when faced with certain dilemmas. This may be in the form of a decision tree or an ethical decision-making framework. As a result, a lawyer faces innumerable ethical decisions in serving his/her client. These ethical dilemmas are further complicated by the sometimes conflicting duties to the client, the courts, and the legal system. The result is ambivalence about lawyers and the legal profession.<sup>554</sup> This includes the continuing negative perception of lawyers, continuous issues with unethical conduct of lawyers and the pressures on the profession resulting from a demanding and taxing

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a functionalism model of bargaining ethics as a means of making more ethical decisions during negotiations).

<sup>553</sup> See Chapter 5 (The Success of Professional Ethics Codes in Controlling Lawyers' Deceptive Behaviour) for more discussion on this topic based on a qualitative study of ethics violation cases in the Queensland legal jurisdiction.

<sup>554</sup> See Chapter 6, Section 6.5 (Consumer Studies of the Legal Profession are the Sting in the Tail) for a detailed discussion of this topic).

operating structure.<sup>555</sup> At the same time that the profession argues for lawyers to be ‘better communicators’,<sup>556</sup> there appears to be a significant lack of practical guidance on how to do so whilst avoiding the ethical dilemmas that present themselves in the real world, especially in negotiations.<sup>557</sup>

A second gap in the literature appears to be that there is virtually no comprehensive discussion or analysis on the application of legal ethics to certain negotiation tactics from a cross-jurisdictional standpoint. This may be due to the fact that the profession recognises separate legal jurisdictions and their respective codes of conduct. However, this view can be problematic. If lawyers are part of a ‘profession’, it would seem that a consistent application of a consistent code of ethics of the profession would go some way to increasing consistent lawyer conduct in a positive way.

Current debate on the ethics codes and its application are on a single-country basis with the United States possibly leading the way in terms of volume, consistent analysis, and intensity of examining legal ethics. For example, there are numerous articles extolling the virtues of the Model Rules of Professional Conduct (MRPC) in

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<sup>555</sup> See, eg, American Bar Association, *Perceptions of the U.S. Justice System* (1998) <<http://www.abanet.org/media/perception/perceptions.pdf>> at 9 August 2010 (study and a comprehensive nationwide survey on the U.S. justice system among the general population consisting of a sample of approximately one thousand respondents age eighteen and older); American Bar Association Section of Litigation, *Public Perception of Lawyers: Consumer Research Findings*, above n 13 (finding, for example, that consumers are still ambivalent about lawyers and lack public confidence in them due to such factors as poor handling of basic client relationships and absence of attention to communication including significant misunderstanding and mistrust of fees).

<sup>556</sup> American Bar Association Section of Litigation, *Public Perception of Lawyers: Consumer Research Findings* – Forward, above n 13 (Robert A Clifford, Section Chair stating that ‘[t]he image of lawyers is not just a matter of professional or personal pride. It affects the public’s belief in our justice system, and ultimately, their faith in our democracy.’).

<sup>557</sup> See, eg, Norton, above n 19, 291 (stating that the ‘ethics of bargaining...must be reconciled with the ethics of the real world.’).

the United States and an equal, or perhaps greater, amount of criticism regarding some of its provisions, especially those which attempt to regulate deceptive conduct.<sup>558</sup>

In Australia, there appears to be less debate about ethics codes, perhaps due to the smaller size of the country and lesser number of lawyers.<sup>559</sup> At the same time, Australia faces similar issues with regards to the public's negative perception of the legal system and its lawyers.<sup>560</sup> A cross-jurisdictional analysis of ethics codes, such as the analysis undertaken in Chapter 4 of this thesis, along with a discussion of similarities and differences, would aid the profession in determining the optimal and most ethically consistent set of standards to which the profession can realistically adhere whilst serving a demanding global society.

As it stands today, lawyers appear to be caught in the contradiction between bargaining's 'practical norms', which 'provide rule[s] for maximizing long range client and lawyer returns'<sup>561</sup> and 'ethical norms', which 'provide rules for representing clients competently and diligently'<sup>562</sup> without resorting to 'meta norms' to 'sort out the contradictions or rank the order commands'<sup>563</sup> so as to provide a means for making appropriate decisions on how to act. These apparent contradictions

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<sup>558</sup> Note: This is discussed in more detail in Chapter 4.

<sup>559</sup> Note: In Australia, there is currently a debate on nationalising the Australian legal profession. Cf Roger Wilkins AO, 'National regulation of the legal profession: An agenda for reform' (2009) *NSW Law Society Journal*; Australian Government Attorney-General's Department, *Council of Australian Governments (COAG) National Legal Profession Reform* (2009) <[http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultationsreformsandreviews\\_CouncilofAustralianGovernments\(COAG\)NationalLegalProfessionReform](http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultationsreformsandreviews_CouncilofAustralianGovernments(COAG)NationalLegalProfessionReform)> at 9 August 2010 (providing information on the history of the national legal profession reforms in Australia and various task force papers).

<sup>560</sup> See, eg, Chris Merritt, 'We need to change our culture, says Victorian DPP', *The Australian* (Sydney), 31 October 2008, 2; The Australian Law Reform Commission (1999) '*Discussion Paper 62: Review of the Federal Civil Justice System, 5. Lawyers and practice standards*' 3 (hereinafter called '*Discussion Paper 62*'); Lakhani, above n 268, 61 (discussing some of the issues facing lawyers in New South Wales in particular).

<sup>561</sup> Robert J Condlin, 'Bargaining in the Dark: The Normative Incoherence of Lawyer Dispute Bargaining Role' (1992) 51 *Maryland Law Review* 1, 71-72, 75-82, 84-84.

<sup>562</sup> Ibid.

<sup>563</sup> Ibid.



can be better aligned through an informed, objective, and cross-jurisdictional analysis of the legal ethics codes.

A third gap in the literature is a lack of understanding of the various, and sometimes, conflicting duties and loyalties of the legal professional when engaged in negotiations. As Lerman argued, and this is even more relevant today, the fundamental profit motivation of today's law firms and legal practitioners in general is not necessarily reflected in the traditional model of lawyer-client relations upon which the regulatory codes are based.<sup>564</sup> This profit motivation may likely conflict with a preferred 'unity of interest' between the lawyer's motivation and the client's objectives. This conflict, then, may provide ample fuel for legal professionals to consider using deception in carrying out their duties. From an economic standpoint, it must be duly recognised that the client pays for the services and it is not unreasonable to expect the lawyer to work on the client's behalf or hold a duty of loyalty to the client at a premium relative to his/her duty to the courts, the justice system and the public interest should there be a conflict. Perhaps it is precisely because of the economic implications, not to mention the livelihood of the legal professional, that a deeper and more comprehensive analysis of these duties might aid the profession and the public in reconciling the nature of professional ethics obligations and societal ethics obligations.

A final gap in the literature worth noting relates to a better and clearer understanding of how to measure whether a negotiation is successful and whether the use or non-use of deception plays a significant role in the perception of a successful negotiation. This issue is important for several reasons. First, lawyers appear to

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<sup>564</sup> Lerman, above n 60, 671-675.

engage in successful negotiations every day as a regular part of their work and they appear to successfully conclude deals on a variety of levels, which are then acknowledged and enforced by the courts. If deception by lawyers is as rampant and egregious as some would contend, then it would seem that there would be less demand for lawyer services, fewer deals being made, or negotiated agreements would frequently collapse. The counterargument may be that a lawyer's use of deception is rampant and egregious but clients are easily manipulated and the self-regulating profession does not, in fact, effectively regulate such conduct. Even where the literature discusses the 'success' of a negotiation in terms of 'efficiency', 'the good outcome', the strategic use of lies, getting an agreement (any agreement) or even the absence of having used deception (and thus an 'ethical' negotiation), there is no consensus on objective criteria which would provide a sound basis for assessing all negotiations. Whether it is necessary to subject a largely self-regulated process such as negotiations to such analysis is arguable. However, some objective criteria may provide a foundation from which to test a hypothesis that the use of deception in negotiations, whether by lawyers or non-lawyers, is so negligible as to not be worth the worry and on-going debate over lawyers being unethical and deceptive in negotiations, at least at a level higher than normal as compared with judges, business people, or society in general. One must at least be open to the possibility that we, as a society and a profession, are 'making a mountain out of a molehill' and that continued judgment against the profession, without some reasonable and objective research, only serves to denigrate the profession and those who would pursue the noble intent and goals of the profession.

In the context of this thesis, I attempt to address at least three of these gaps through the research questions outlined in Chapter 1. First, in addressing the first research question of whether lawyers engage in deceptive conduct in negotiations, I review the existing literature and research to develop a catalogue of potentially deceptive behaviours by lawyers, especially in negotiation. In addition, I examine the possible excuses or sources used by lawyers to justify deceptive conduct, especially in negotiations.<sup>565</sup> The results are then used to focus on answering the second research question.

The second research question is related to how the legal ethics codes, a key source of both acceptable and impermissible lawyer conduct, affect the use of deception in negotiation. In order to answer the second research question, I take a deeper look at the relationship between societal ethics, bargaining ethics, and legal ethics to determine whether they might be incongruent and whether this may impact the legal professional's use of deception in negotiation. This analysis involves a cross-jurisdictional analysis of the legal ethics codes of a select group of common-law jurisdictions.<sup>566</sup> The purpose of this study is to determine whether and how each jurisdiction's legal ethics code regulates the use of deception in negotiations and whether they address negotiations at all. The results of this analysis provide insight into answering the third research question.

The third research question analyses whether the legal ethics code, which serve as the primary regulatory mechanism by which lawyers' conduct is controlled, are successful in regulating deception in negotiation. In order to address the third

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<sup>565</sup> See Chapter 3 (Alleged Deceptive Behaviours of Lawyers) for more information.

<sup>566</sup> See Chapter 4 (Efforts by Professional Ethics Codes to Regulate Deceptive Behaviours in Negotiation) for more information.

research question, I conduct an original analysis of the legal ethics violation cases in one particular common-law jurisdiction to see whether cases involving deception in negotiation are prosecuted and how they are decided under the jurisdiction's legal ethics codes.<sup>567</sup>

The combined findings and insights from each of the research questions leads to the conclusion that the profession would benefit from a set of strategic policy reforms to address the complex, multidimensional issue of deception in negotiation. These integrated policy reform proposals are the focus of the final research question and are outlined in Chapter 7.

In summary, through the four research questions and the contribution they make to the field, this thesis provides a significant contribution to effective policy reforms as well as a more stable foundation and analytical framework for understanding this important yet understudied area of these interrelated disciplines of law, ethics, and negotiation.

## **2.7 CHAPTER CONCLUSION**

This chapter provided a comprehensive discussion and analysis of existing literature in the central research areas of this thesis. Commencing with a discussion of competing perspectives and existing theoretical frameworks impacting the relevant areas of research, this chapter established a conceptual framework for the proposed research questions. Next, a synthesis of the literature review was followed by a critical analysis of existing published scholarly research in light of the proposed research questions. This included a discussion of the major findings, strengths, weaknesses and potential gaps in the existing literature. Finally, this chapter

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<sup>567</sup> See Chapter 5 (The Success of Professional Ethics Codes in Controlling Lawyers' Deceptive Behaviour) for more information.

concluded with a discussion of how this thesis addresses some of these gaps and provides a valuable, original contribution to the existing body of research whilst recommending an integrated set of strategic policy reform proposals to address the issues highlighted by the literature review and analysis of the research questions.

The next chapter begins to look more closely at the first research question, namely whether lawyers use deception in negotiation and the justifications for such behaviour.

## **CHAPTER 3 – ALLEGED DECEPTIVE BEHAVIOURS OF LAWYERS**

*‘I do not see why we should not come out roundly and say that one of the functions of a lawyer is to lie for his client....’*

*~ Charles P Curtis<sup>568</sup>*

This chapter discusses the results of the research findings related to the first research questions, namely whether lawyers engage in alleged deceptive behaviour, especially in negotiation. First, this chapter presents the results of qualitative research on the ways in which some lawyers appear to deceive clients. This chapter also identifies how lawyers might attempt to justify potential deceptive behaviours. This chapter concludes with a brief discussion of insights gained from the results and analysis of this first research question, insights which form the basis of recommending the policy reform proposals outlined in Chapter 7.

### **3.1 INTRODUCTION**

Chapter 1 established the research questions and hypotheses. The research questions are aimed at addressing the following issues: 1) the types of potentially deceptive behaviours that lawyers might use; 2) attempts by professional ethics codes to control such behaviour in negotiations; and 3) whether attempts to control deceptive behaviour in negotiations through professional ethics codes are successful.

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<sup>568</sup> Curtis, above n 246, 3. See also Alan M Dershowitz, *The Best Defense* (1982) (stating that “lying, distortion and other forms of intellectual dishonesty are endemic among judges...the courtroom oath – ‘to tell the truth, the whole truth and nothing but the truth’ – is applicable only to witnesses. Defense attorneys, prosecutors and judges don’t take this oath. They couldn’t!” Dershowitz was also highly critical of some prosecutors in Manhattan, stating that “prepared to close their eyes to perjury; to distort the truth; and to engage in cover-ups - all in the name of defending society from the obviously guilty.”). One of the central and ongoing issues of the legal profession which is now really a turning point for the profession is whether times have changed or whether they should change with respect to this perception and consistent view of lawyers and how to go about affecting that change.

The results of addressing these issues leads towards the recommendation for a strategic set of policy reforms as outlined in Chapter 7.

The first research question addresses the types of deceptive behaviours that lawyers might engage in as alleged by scholars, the public, and other lawyers. As discussed previously, legal professionals, even today, are perceived negatively among the public it is meant to serve.<sup>569</sup> As a quick summary, a 2002 survey in the United States found that only 19% of Americans surveyed were “very” or “extremely confident” about US lawyers and the US legal profession, the second lowest rating behind the media in US consumer confidence.<sup>570</sup> A 2003 study in Australia<sup>571</sup> as well as the Australian Law Reform Commission’s review of the profession indicates a similar lack of confidence with the Australian legal system.<sup>572</sup>

Interestingly enough, in addressing the first research questions, the results of the qualitative research appears to demonstrate a consistency with the 2002 American Bar Association study mentioned above with respect to US lawyers and the legal profession. As discussed in various sections of Chapter 2, research into actual negotiation behaviour of legal professionals is marred by process, methodological and institutional obstacles, not the least of which is the attorney-client privilege, duties of loyalty and time pressures which accompany the practice of law. There are very few valid, statistically significant, and therefore trustworthy studies regarding the

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<sup>569</sup> See Chapter 6, Section 6.5 (Studies of the Legal Profession Recommend Change) for more discussion on this topic. See also W William Hodes, ‘Truthfulness and Honesty Among American Lawyers: Perception, Reality, and the Professional Reform Initiative’ (2002) 53 *South Carolina Law Review* 527, 528-530 (citing various US sources that confirm the declining public trust in lawyers and the legal profession).

<sup>570</sup> American Bar Association Section of Litigation, *Public Perception of Lawyers: Consumer Research Findings*, above n 13, 6.

<sup>571</sup> Dasey, above n 13 (“The judiciary attracted confidence from just 15per cent of people, less than vets (43per cent), teachers (34per cent), scientists (27per cent) and local shopkeepers (20per cent).”)

<sup>572</sup> *Discussion Paper 62*, above n 560, 3.

potentially deceptive or manipulative practices of legal professionals. This is true for the United States as well as Australia as discussed in this thesis. However, anecdotal data is available which sheds some light on whether lawyers engage in deceptive behaviours, especially in negotiations. The following sections describe and discuss the results of these anecdotal studies as reported mainly by scholars in the United States and Australia. The most important point to take away from these studies is that lawyers do appear to engage in deceptive conduct in practice, including in negotiation, such that the topic of deception in negotiation is still ripe for research. These results are adapted from the findings and analyses of Lerman (1990),<sup>573</sup> Wetlaufer (1990),<sup>574</sup> Krivis (2002),<sup>575</sup> Pengilley (1993) and Davis (1994),<sup>576</sup> legal scholars and practitioners who have undertaken the most detailed look at lawyers' potentially deceptive behaviour. Prior to discussing these studies, it is important to note that the findings of the studies are reflective of the attitudes and behaviours of lawyers within the study's jurisdictional context and is not meant to be reflective of all lawyers across all jurisdictions. However, it is also important to note that in the context of the common-law system that is the focus of this thesis, the tasks of non-transactional lawyers is similar and these findings may be extrapolated as applying across common-law jurisdictions and ripe for further research. The next section focuses on how lawyers might deceive clients, either intentionally or unintentionally.

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<sup>573</sup> See Lerman, above n 60, 659.

<sup>574</sup> See Wetlaufer, above n 31, 1219.

<sup>575</sup> See Jeffrey Krivis, *The Truth About Deception in Mediation* (2002) <[http://www.firstmediation.com/truthmed\\_p.htm](http://www.firstmediation.com/truthmed_p.htm)> at 9 August 2010. This article was also published in the 2002 edition of *Alternatives*, a newsletter by CPR.

<sup>576</sup> See Warren Pengilley, "But You Can't Do That Anymore" – The Effect of Section 52 on Common Negotiating Techniques' (1993) 1 *Trade Practices Law Journal* 113-129.



### 3.2 LAWYERS DECEIVING CLIENTS

One of the major areas where lawyers tend to engage in potentially deceptive conduct is with and on behalf of their clients. To some degree this is not surprising as the majority of legal ethics codes discussed in this thesis, while expressly prohibiting deception and misleading conduct with other practitioners and third parties, do not contain explicit rules on such behaviour with clients or in the context of negotiation.

One of the most detailed analyses of how lawyers might be deceptive is Lerman's anecdotal study in the United States. Lerman conducted a small, anecdotal study on ways in which lawyers reported lying to clients or other lawyers.<sup>577</sup> Of special mention is that these findings are reports from US lawyers directly, who readily admit that they engage in such conduct as a normal and acceptable part of legal practice. The results of Lerman's study are presented in the table below, followed by a discussion of key insights.

**Table 3.1: Lawyer Deceiving Clients (Lerman 1990)<sup>578</sup>**

Note: The following is a summary chart of the findings of Lerman's 1990 small and informal anecdotal study on ways in which US lawyers say they deceive clients. Categories and behaviours are as described by Lerman to ensure accuracy and clarity.

Category / Sub-category	Deceptive Behaviour
<b>1. Billing</b>	
Doing non-essential work – running the meter (then billing for it)	<ul style="list-style-type: none"><li>▪ Perform unnecessary work then billing client for it;</li><li>▪ Inflate or cut the amount of work depending on client's resources;</li><li>▪ "...most common [type of deception], by far, is 'make work' that the client pays for but didn't lead very directly to the result.";</li><li>▪ Lawyer's discretion on how to approach work means the same work can cost very different amounts;</li><li>▪ Lawyer's pecuniary interests are affected by</li></ul>

<sup>577</sup> Lerman, above n 60, 703-705.

<sup>578</sup> Adapted from Lerman's 1990 anecdotal study. See Lerman, above n 60, 659. Note: Lerman indicated that many of these findings are from law firms and that the law firm environment tends to encourage such deception.

Category / Sub-category	Deceptive Behaviour
	<p>settlement advice to clients, especially in contingent fee cases;</p> <ul style="list-style-type: none"> <li>“...more likely that a lawyer would attempt to deceive a client into continued litigation, including trial, by inflating the client’s chances of success.”</li> </ul>
Padding bills and double billing	<ul style="list-style-type: none"> <li>inflating or padding bills of wealthy clients... “deception, to the tune of tens of thousands”;</li> <li>“...I generally bill as much as I can to the richest client [and under bill] clients who can’t afford standard rates...”</li> <li>bill for more hours than actually worked;<sup>579</sup></li> <li>billing to clients for the same work;</li> <li>fabricating hours worked;<sup>580</sup></li> <li>removing monies from trust account and then fabricating the record to conceal from client;</li> <li>double-billing in order to meet minimum billable hours;</li> <li>knowing answer to client’s question but not telling client, doing unnecessary research and then billing the client for it.... “a pure case of lying, cheating, and stealing...”;</li> <li>under billing clients who are ‘friends’</li> </ul>
Meeting minimum firm hours requirement	<ul style="list-style-type: none"> <li>billing hours not actually worked to meet firm minimum requirements;</li> <li>‘fudge’ hours worked to meet minimum when there is not enough work to meet the minimum hours standard</li> </ul>
Premium billing / itemization	<ul style="list-style-type: none"> <li>‘premium billing’ (especially in law firms) certain clients – “adding substantial sums to the bill based on a subjective determination of the value of the work”<sup>581</sup></li> <li>using hours as a minimum and then premium billing to take advantage of ‘information imbalances’</li> <li>sending non-specific or non-itemized bills to discourage questions;</li> <li>concealing the firm’s billing ‘multiplier’ on the bill but not informing client about it.</li> </ul>

<sup>579</sup> Fortney, above n 382, 239 (discussing Lerman’s study and concurring with Lerman’s findings on this topic).

<sup>580</sup> Ibid.

<sup>581</sup> Lerman, above n 60, 714. See also W William Hodes, ‘Conference on Legal Ethics: “What Needs Fixing?”: Cheating Clients with the Percentage-of-the-Gross Contingent Fee Scam’ (2002) 30 *Hofstra Law Review* 767, 767-773 (describing a deceptive billing practice used by some contingent fee lawyers).

Category / Sub-category	Deceptive Behaviour
Non-contemporaneous records	<ul style="list-style-type: none"> <li>▪ failing to keep accurate record of time worked – “...perhaps the most prevalent deceptive billing practice among the lawyers...”</li> <li>▪ “small amounts of time often get fudged”;</li> <li>▪ forgetting about actual time worked and charging more if lawyer feels client can afford it</li> </ul>
Charging clients for perks, leisure, and admin time	<ul style="list-style-type: none"> <li>▪ billing clients for time spent on non-legal activities and expenses not related to that client’s case;</li> <li>▪ billing clients for admin tasks necessary for effective case management (not clear if this is deceptive or not)</li> </ul>
Explaining the bill	<ul style="list-style-type: none"> <li>▪ when client challenges the bill, “the lawyer often buttresses one lie with another.” (many times due to minimum firm billing requirements);</li> <li>▪ “cloak the firm’s practices by offering client incomplete answers”;</li> <li>▪ “duplicitous interaction with the client” and manipulating an associate to deliver the information thus being dishonest with the associate as well</li> </ul>
<b>2. Bringing in Business</b>	
Exaggeration of expertise	<ul style="list-style-type: none"> <li>▪ overstate experience or expertise of the firm or attorney (presumably to get the business) – consider this ‘puffing’ not lying;</li> <li>▪ billing clients (especially large clients) for ‘study time’ if new area of law or new for client;</li> <li>▪ “...engage in puffing by being intentionally vague about actual experience...”</li> <li>▪ deceive clients about extent of experience or access to influential people</li> <li>▪ failing to correct client’s incorrect impression about lawyer’s expertise or failing to offer complete information</li> </ul>
Business development	<ul style="list-style-type: none"> <li>▪ recommending clients need additional work when they might not – for own pecuniary interest</li> <li>▪ encouraging clients to file comments on proposed agency rules then billing client for them when may not be necessary or benefit the client</li> </ul>
<b>3. Covering Up Mistakes</b>	
	<ul style="list-style-type: none"> <li>▪ failing to disclose mistakes for fear of losing client confidence;</li> <li>▪ concealing errors and not informing client;</li> <li>▪ procrastinating or doing mediocre work and still billing for it; not advising client;</li> <li>▪ failing to return phone calls quickly and making excuses for not calling client back;</li> </ul>

Category / Sub-category	Deceptive Behaviour
	<ul style="list-style-type: none"> <li>withholding documents from client so client would not see mediocre work;</li> <li>the “more serious the error or oversight, the greater the incentive to conceal it”;</li> <li>missing deadlines; sending documents to clients that contain errors of law or facts</li> </ul>
<b>4. Impressing Clients</b>	
Who did the work	<ul style="list-style-type: none"> <li>most common way in deceiving clients in this category is “precluding associates who did the work from signing documents sent to clients.”</li> <li>Partners telling client they did the work when actually associate did the work; associate not given credit</li> <li>Associate doing all the pre-trial work but partner doing trial and not telling client who did actual work so client can make informed decision</li> </ul>
Making work look easier or harder	<ul style="list-style-type: none"> <li>Deceiving client about one’s availability or how long certain work will take;</li> <li>Taking on more work than a lawyer can actually handle;</li> <li>Making the work look harder than it is to impress client;</li> <li>Inaccurately portraying negotiations so client gets impression that lawyer really “had to fight for it” to impress client</li> </ul>
Deception about what the law is / Value of case or lawyer’s fee	<ul style="list-style-type: none"> <li>“...misstatements of the intent of the law is...one of the most prevalent and odious forms of deception in the legal business...”; (either lawyer lies to client about the law or client wants lawyer to misinterpret the law)</li> <li>“lowballing” – “underestimating the value of the case so that the eventual settlement, compared to the original projection, looks favorable to the client.”<sup>582</sup></li> </ul>
Strategic deception	<ul style="list-style-type: none"> <li>withholding lawyers’ honest opinion of client to protect client;<sup>583</sup></li> <li>withhold information from client as part of strategy of courtroom presentation;</li> <li>withhold information about certain tactics as part of lawyer’s discretion</li> </ul>
<b>5. Convenience and Control of Work Time</b>	
When a client calls	<ul style="list-style-type: none"> <li>using secretaries to convey ‘white lies’ to clients about availability of lawyer or whereabouts of</li> </ul>

<sup>582</sup> Lerman, above n 60, 734.

<sup>583</sup> See, eg, Menkel-Meadow, above n 19, 778-779 (discussing how lawyers might also deceive by silence and withholding information from the client).

Category / Sub-category	Deceptive Behaviour
	<p>lawyer;</p> <ul style="list-style-type: none"> <li>lie about status of case or status of pending work;</li> <li>failing to report to client on actions taken so as to retain greater control over case;</li> <li>“lawyer uses deception to solve a problem even though there are truthful solutions to many of these problems.”<sup>584</sup></li> </ul>
Progress reports on work	<ul style="list-style-type: none"> <li>lying to client about status of certain tasks when client specifically asks even if not done to “keep the client satisfied” by having them think their work is being attended to;</li> <li>Not reporting to clients certain aspects of their work – for example, “draw the line between substance and procedure”;</li> </ul>
Impact of workload on advice	<ul style="list-style-type: none"> <li>Presenting a settlement offer to a client in a way to induce the client to take it because lawyer does not want to go to trial;<sup>585</sup></li> <li>Advising client to not file certain documents or comments because lawyer does not have time; not providing sufficient information so client can make informed decision</li> </ul>
<b>6. Impressing the Boss</b>	
	<ul style="list-style-type: none"> <li>Deceiving clients to make a good impression on the partner/boss – increase chances of promotion or avoid conflict;</li> <li>Repeating misinformation;</li> <li>Advising ‘yes’ to something a client wants to do instead of ‘no’ even when lawyer knows it is potentially illegal (especially in corporations where it is generally pro-business and lawyers are sometimes expected to go along);</li> <li>Law firm and partner expectations that create an atmosphere where “nobody tells the truth”</li> <li>Using deception to mediate a conflict between supervisor’s expectations and client’s interests</li> <li>“the demands of a paying client came before the ethical demands of the profession” (re a <i>pro bono</i> case)</li> </ul>

<sup>584</sup> Lerman, above n 60, 739 (Some lawyers in Lerman’s study indicated that sometimes these potentially harmful lies were the result of the pressure to stay on top of things and that clients have unrealistic expectations or don’t understand law practice.).

<sup>585</sup> See, eg, Menkel-Meadow, above n 19, 777 (discussing these types of deceptions where lawyers might fail to disclose risks and benefits of lawsuits and encourage settlement despite the client’s best interest).

Table 3.1 identifies six major categories of deceptive behaviour as reported by US practicing lawyers. Lerman's study identifies the types of deceptive behaviours that lawyers engage in with clients. Because lawyers tend to serve multiple clients at the same time and have to juggle duties to the client, the courts, opposing lawyers, and the public, lawyers could be said to engage in mini-negotiations of all the various tasks required to handle a client's case. In the course of zealous representation of the client, the lawyer-client relationship is, in itself, a negotiation of communicating and completing key tasks to resolve the dispute. This is likely more prevalent and true where the lawyer-client relationship model is based on the revisionist model which argues for adherence to principles of client autonomy, client-centred practice and informed consent.<sup>586</sup> Lawyer-client relationships under the revisionist model expose the lawyer to community expectations of such relationships interspersed, and sometimes in competition with, the legal profession's expectations based on an adversarial model. Such relationships would also involve greater interaction and communication with the client. As a result, the lawyer may need to provide more explanations and justifications, which can create an environment conducive to certain types of deception because of a lawyer's profit motivation, the economics underlying the lawyer-client relationship or because clients do not always understand what lawyers do or why.<sup>587</sup>

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<sup>586</sup> See Chapter 2, Section 2.3.8 (Theories of Lawyer-Client Relationships and Legal Negotiation) for a detailed discussion on theories of lawyer-client relationships.

<sup>587</sup> See eg, Linda Haller, 'Solicitors' Disciplinary Hearings in Queensland 1930-2000: A Statistical Analysis' (2001) 13.1 *Bond Law Review* 1; Linda Haller, 'Disciplinary Fines: Deterrence or Retribution?' (2002) 5 *Legal Ethics* 152; Leslie C Levin, 'Building a Better Lawyer Discipline System: The Queensland Experience' (2006) 9(2) *Legal Ethics* 187-210 (discussing that in many cases lawyers may lie or clients may complain simply because they don't understand the nature of how lawyers must work within the legal system).

Lerman's study was targeted towards lawyer deception of clients and was based on anecdotal data in the form of stories used to describe situations where a lawyer might engage in deception of clients, especially within an economic context. Shaffer supports Lerman's use of stories as adding value to the ethics discussion.<sup>588</sup> Lerman's study is important when looking at future policy reforms as discussed in Chapter 7 because the study confirms that lawyers do engage in deception, that such behaviour has a negative impact on clients, and that the behaviour is, in part, the result of a possible gap in the legal ethics codes, the way lawyers are taught to practice through legal education, and driven by the demands of the legal profession.

Menkel-Meadow concurs with many of Lerman's findings and supports Lerman's study as raising important questions about the ability of legal ethics codes to prohibit lawyers from lying to their clients.<sup>589</sup> However, Menkel-Meadow argues that Lerman's study does not fully address a number of issues in the US related to lawyers lying outside the 'market model of lawyering'.<sup>590</sup> These situations involve those that occur in private practice but may not have a direct impact on the client,<sup>591</sup> including, but are not limited to, misrepresentation of expertise or experience, failure to disclose mistakes made in the work product, and questionable arrests made by a district attorney who is seeking public office in order to gain publicity.<sup>592</sup> Menkel-Meadows

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<sup>588</sup> Thomas L Shaffer, 'On Lying for Clients' (1996) 71 *Notre Dame Law Review* 195, 196-197, 203-204 (discussing Lerman's study and the use of stories as an important part of understanding and discussing ethics).

<sup>589</sup> Menkel-Meadow, above n 19, 761-762 (providing a brief summary of Lerman's findings and recommendations).

<sup>590</sup> Menkel-Meadow, above n 19, 763-764 (referring to Professor Lerman's analysis as based on the recognition that law is a business while Menkel-Meadow discusses the topic from law as a profession outside of the market-based view).

<sup>591</sup> Menkel-Meadow, above n 19, 775-777 (distinguishing lawyer lying scenarios in public or non-market lawyering from those in fee-for-service lawyering).

<sup>592</sup> *Ibid.* Some of these are addressed in Lerman's findings as related to its impact on clients.

recommends a golden rule of candour for these types of scenarios<sup>593</sup> as well as other types of lies that lawyers might use *outside of* a competitive market model of legal services.<sup>594</sup>

Despite some criticisms, Lerman's study provides a foundation from which to draw some conclusions, one being that more in-depth exploratory research would be beneficial in identifying additional situations where lawyers might engage in deception and confirming Lerman's findings.<sup>595</sup> These comments also support the view that US lawyers do appear to engage in deception and that such deception is likely exacerbated by a competitive and global market economy for legal services.

While Lerman's study was targeted towards lawyer deception of clients, these behaviours can be extrapolated to apply to similar deceptions that may occur between lawyers, meaning that just as a lawyer might deceive a client regarding the status of a case, billing, settlement negotiation offers and expertise, lawyers may deceive each other and their opponents along the same lines or be tempted to deceive the court in furtherance of their client's case under the guise of zealous representation. As such, Lerman's findings have value in confirming that lawyers themselves acknowledge the use of various forms of potentially deceptive behaviours.

### **3.3 LAWYERS JUSTIFYING DECEPTIVE BEHAVIOUR**

In addition to Lerman's informal research, Wetlaufer conducted an informal study of US lawyers' behaviours and the justifications that some US lawyers give for engaging in deceptive conduct. The following table contains results adapted and

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<sup>593</sup> Menkel-Meadow, above n 19, 770-774 ('Lawyers should reveal to their clients that which they would want revealed to them if they were clients.').

<sup>594</sup> Menkel-Meadow, above n 19, 775-779. See also Terry, above n 548 (discussing the impact of lawyers being seen as service providers rather than professionals).

<sup>595</sup> Menkel-Meadow, above n 19, 778-779 ('We need an exploratory study in this field, as Professor Lerman has done in the market context, before we can fully canvass the issues.').



extracted from Wetlaufer's findings of ways in which lawyers appear to excuse, justify, or explain deceptive behaviours in negotiations.

**Table 3.2: Catalogue of Statements and Justifications for Deceptive Conduct by Lawyers (Wetlaufer 1990)<sup>596</sup>**

Note: The following is a summary chart of the findings of Wetlaufer's 1990 US informal study on ways in which lawyers justify that lying is permissible in negotiation.<sup>597</sup> Categories and behaviours are as described by Wetlaufer to ensure accuracy and clarity.

Category	Sample Statements/Explanations
<i>"I didn't lie"</i>	<ul style="list-style-type: none"> <li>▪ "I didn't lie because I didn't engage in the requisite act or omission";</li> <li>▪ "I didn't mean to do anything that can be described as lying"; "I did not have the requisite intent."</li> <li>▪ "I didn't lie because what I said was, in some way, literally true";</li> <li>▪ "I can't have lied because I was speaking on some subject about which there is no 'truth'"; and</li> <li>▪ "I didn't lie, I merely put matters in their best light."; "strategic speaking" that is part of art of "lawyering"</li> </ul>
<i>"I lied, if you insist on calling it that, but it was..."</i>	<ul style="list-style-type: none"> <li>▪ it was not ethically impermissible;</li> <li>▪ there is no general duty of disclosure;</li> <li>▪ everybody does it (i.e. lie about this type of matter)</li> </ul>
<i>"I lied but it was legal."</i>	<ul style="list-style-type: none"> <li>▪ "I may have lied but it was ethically permissible because it was not legally forbidden."</li> </ul>
<i>"I lied but it was on an ethically permissible subject."<sup>598</sup></i>	<ul style="list-style-type: none"> <li>▪ lie about property that is subject matter of a transaction;</li> <li>▪ it was only about strength of a cause of action;</li> <li>▪ lie about those subjects about which their adversary could have or should have known the truth;</li> <li>▪ it was only an opinion;</li> <li>▪ it was 'internal' to the negotiations (e.g. Interests, authority, priorities, etc) not subject to disclosure;</li> <li>▪ it was about reservation price (i.e. acceptable deception)</li> </ul>
<i>"I lied but it had little or"</i>	<ul style="list-style-type: none"> <li>▪ it was only a 'white lie';<sup>599</sup></li> </ul>

<sup>596</sup> See generally Wetlaufer, above n 31.

<sup>597</sup> Wetlaufer, above n 31, 1235-1236 (making the distinction between law and ethics; arguing that simply because the rules of legal ethics may permit deception does not mean it is ethically permissible).

<sup>598</sup> Wetlaufer, above n 31, 1243 ("It is in the nature of law that it will not, indeed cannot, undertake to prohibit all forms of bad conduct. In any event, the fact that some of these lies will not support a suit for civil remedies, standing alone, is no indication that we regard these lies as ethically permissible.").

<sup>599</sup> Wetlaufer, above n 31, 1243 (describing 'white lie' as those purpose is said to "only to smooth the seas, to grease the wheels of discourse and commerce, perhaps to create the illusion of relationship where none really exists, and, in these ways, to enhance the possibility of agreement.").

Category	Sample Statements/Explanations
<i>no effect."</i>	<ul style="list-style-type: none"> <li>▪ using "I can't" instead of "I don't want to" even when you can accept an offer and is within authorized limit</li> <li>▪ it was 'puffing' or 'immaterial';<sup>600</sup></li> <li>▪ lie was not believed;</li> <li>▪ lie was believed but later discovered so not a lie;</li> <li>▪ lie had no effect on the outcome</li> </ul>
<i>"I lied, but it was justified by the very nature of things [negotiations] ..."</i>	<ul style="list-style-type: none"> <li>▪ "lying is necessary and useful in negotiations"</li> <li>▪ "lying is within the rules of the game"<sup>601</sup></li> </ul>
<i>"I lied but it was justified by the nature of my relationship to the victim...."</i>	<ul style="list-style-type: none"> <li>▪ lying is justified by the relationship of the parties to process (e.g., criminal pleads not guilty to invoke state's need to prove conduct even though he knows he's guilty; parties to negotiation claim they can lie as a matter of right because of rules of the game);</li> <li>▪ rules of litigation and partisan interests of client permit certain lies or deceptions</li> </ul>
<i>"I lied, but it was justified by the special ethics of lawyering..."</i>	<ul style="list-style-type: none"> <li>▪ lawyers' special duties of loyalty and zealous representation mean it is "therefore ethically permissible, or even ethically mandatory, for lawyers to tell lies on behalf of their clients."<sup>602</sup></li> <li>▪ Lawyer's duty to client means that a "lawyer is required to be disingenuous."<sup>603</sup></li> <li>▪ Lawyer's duty to preserve confidences of client means he may lie in certain circumstances (e.g. lie to protect certain secrets in negotiations)</li> </ul>
<i>"The lie belongs to someone else"</i>	<ul style="list-style-type: none"> <li>▪ Lie is client's lie and not responsibility of lawyer even though lawyer told it; "the principle of</li> </ul>

<sup>600</sup> Wetlaufer, above n 31, 1243 (saying that speakers who invoke this excuse are referring to those which the law regards as permissible and not actionable (citing *Model Rules of Professional Conduct*, Rule 4.2, commentary at 89-90 (Discussion Draft 1980) (Chicago: American Bar Association))

<sup>601</sup> Wetlaufer, above n 31, 1248 (discussing why this particular justification is not warranted because the 'rule of the game' with regards to negotiation are within the definition of bona fide rules which warrant credibility or compliance).

<sup>602</sup> Wetlaufer, above n 31, 1255 ("In this form, the lawyers' duty to their clients entails an affirmative obligation to perform all lawful acts without regard to ethics.").

<sup>603</sup> Wetlaufer, above n 31, 1256 (quoting Harry T Edwards and James J White, *Problems, Readings, and Materials on the Lawyer as Negotiator* (1977) 373-89, 378.). See also Curtis, above n 246, 3-23 (saying that "... one of the functions of a lawyer is to lie for his client."); Arthur Applebaum, 'Professional Detachment: The Executioner of Paris' (1995) 109 *Harvard Law Review* 458, 486 ("Lawyers...as serial liars and thieves. He would observe that lawyers - good lawyers - repeatedly try to induce others to believe in the truth of propositions or in the validity of arguments that they themselves do not believe, and he would observe that lawyers - again, good lawyers - often devote their skills to advancing the unjust ends of rapacious clients"); Evan Whitton, 'Immoral ethics in an immoral system' (2006) 64 *Living Ethics* 8 <<http://www.ethics.org.au/about-ethics/ethics-centre-articles/living-ethics-newsletter/pdfs/issue-64-article-1.pdf>> at 9 August 2010 (discussing several quotes aimed at showing "how the concept of adversary ethics is based on a fallacy").

Category	Sample Statements/Explanations
	<p>nonaccountability according to which lawyers are not accountable for the things their clients have done”<sup>604</sup></p> <ul style="list-style-type: none"> <li>▪ ‘soldier’s excuse’ – that lawyer lied but it is permissible by rules so his lie is attributable ‘to the profession’ or the state or jurisdiction<sup>605</sup></li> </ul>
<i>“I lied because my opponent acted badly”</i>	<ul style="list-style-type: none"> <li>▪ lie is justified as self-defence because of bad acts of opponent;</li> <li>▪ lie is justified as means to offset the effects of opponents’ lies;</li> <li>▪ lie is justified as punishment or retaliation for the lies of another in order to teach him/her a lesson;</li> <li>▪ "my lie was justified because my adversary has forfeited his right to honest treatment."<sup>606</sup></li> <li>▪ “but for my adversary’s error or incompetence, my lie would have caused no harm.” (i.e. I lied but it was my adversary’s error or incompetence which cause the harm, not my lie)</li> </ul>
<i>“I lied, but it was justified by good consequences”</i>	<ul style="list-style-type: none"> <li>▪ “...lies are ethically permissible because they work to prevent a greater immorality.” (e.g., lying in negotiations with terrorists or lying in negotiations to ensure a more fair price, block a greater evil from occurring)</li> <li>▪ “lies are sometimes said to be justified by the good they may produce” (e.g., ““I need money for my child's operation and that's all the justification I need.”)</li> </ul>

Wetlaufer’s informal study on ways in which lawyers in the US justify the use of deceptive behaviour in negotiation is important for two primary reasons. First, the sample statements and justifications highlight the paradox that sometimes exists between ethics in the general philosophical sense (or social ethics),<sup>607</sup> the rule-based ethics of the legal system as codified in the legal ethics codes, and the bargaining

<sup>604</sup> Wetlaufer, above n 31, 1263-1264.

<sup>605</sup> Wetlaufer, above n 31, 1265 (asserting with regards to this excuse that “[t]he state has neither compelled nor expressly permitted them to lie. The most that the lawyers can say is that certain lies have not been prohibited.”).

<sup>606</sup> Wetlaufer, above n 31, 1268 (The golden rule is "do unto others as you would have them do unto you;" it is not "do as you believe, or fear, they may be doing to you.").

<sup>607</sup> See Chapter 2 for a more detailed discussion on the various philosophical models of ethics. See also Graham, above n 138.

ethics of the negotiating world.<sup>608</sup> In reviewing the statements and justifications above, it seems clear that lawyers are willing to admit that under all general notions of what is right and wrong (meaning as compared with society's general view), deception is clearly not appropriate while, at the same time, arguing that deception is permissible under the legal ethics codes.

The rule-based ethics of the legal profession permits lying in some circumstances under the guise of zealous representation or due to the lawyer's role in society. Such statements and justifications clearly reinforce the standard conception of the lawyer's role with its dual principles of non-accountability and partisanship that has been widely discussed and debated.<sup>609</sup> In other words, while society in general may condemn deception,<sup>610</sup> lawyers are constantly thrust into gray areas where societal notions of right and wrong collide with the legal system's obligation to zealous representation of clients, delivering justice, and protecting the public interest using the various, sometimes conflicting and inconsistent, rules under which the legal system operates.<sup>611</sup>

Many of the justifications for the use of deception point directly to the lawyer's understanding or perception of acceptable conduct under these professional ethics rules of the legal system, even if the rules do not explicitly allow such conduct. The justifications lawyers use for using deception as they relate to the legal ethics rules include: 1) there was no intent to lie; 2) it was not ethically impermissible to lie;

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<sup>608</sup> See Chapter 2 (Review of Literature) for a more detailed discussion on bargaining ethics.

<sup>609</sup> See Chapter 2 for a more extensive discussion on the standard conception of lawyers. See also Parker and Evans, above n 156, 14; Luban, above n 157.

<sup>610</sup> This is debatable. See, eg, Lakhani, above n 7 (discussing the various interpretations on the morality or legality of lying).

<sup>611</sup> See, eg, Levin, above n 587, 196 ("Lawyers are unquestionably engaged in a business, but they are not the same as the businesses of car salesmen or shopkeepers. Lawyers have competing ethical duties to the courts, to their clients and to the public. They are paid to make complex judgment calls every day.")

3) it was 'strategic speak' or 'lawyer talk' and therefore acceptable; 4) there is no duty of disclosure; 5) it was only 'puffing'; and 6) lying is permissible within the rules of the game.<sup>612</sup>

Second, the statements and justifications in Wetlaufer's findings highlight the extent to which acceptable forms of deception under conventional negotiation practice have crept into the lexicon and practice of lawyer negotiations. On the one hand, legal ethics codes generally condemn any form of deception in any forum, including negotiations.<sup>613</sup> On the other hand, negotiation theory and principles readily acknowledge, and sometimes expect, that deception is part of the negotiations 'dance'.<sup>614</sup> In addition, most legal ethics codes are silent with respect to how lawyers should act when they negotiate or silent on the extent to which negotiation is a distinct role of lawyers.<sup>615</sup> This silence has as much impact on lawyer behaviour as rules which explicitly tell lawyers what is acceptable or unacceptable in other areas of legal practice. Therefore, if lawyers engage in the process of negotiation, it would seem that they must, by way of being immersed in the 'culture of negotiation' combined with the lack of explicit guidance in the ethics codes, be forced to use certain forms of deception if they are to be successful in the zealous representation of their clients.<sup>616</sup>

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<sup>612</sup> Wetlaufer, above n 31.

<sup>613</sup> See Chapter 4 (Efforts by Professional Ethics Codes to Regulate Deceptive Behaviours in Negotiation) for more information on a comparative analysis of select common-law legal ethics codes.

<sup>614</sup> Note: The term negotiations 'dance' is used synonymously with thinking of negotiations as a game or a process where certain conduct, such as deception is expected and accepted as normal. See, eg, Wendi L Adair and Jeanne M Brett, 'The Negotiation Dance: Time, Culture, and Behavioural Sequences in Negotiation' (2005) 16(1) *Organization Science* 33-51 (discussing the negotiation 'dance' across various cultures).

<sup>615</sup> See Chapter 4 (Efforts by Professional Ethics Codes to Regulate Deceptive Behaviours in Negotiation) for more information on a comparative analysis of select common-law legal ethics codes.

<sup>616</sup> See, eg, White, above n 60; But see Wetlaufer, above n 31, 1243 (arguing that all forms of deception are lying and should not be condoned).

Wetlaufer's study points to numerous statements made by lawyers, which are used to justify the use of deception as acceptable under prevailing negotiation theory and principles. These statements include: 1) everybody does it; 2) it is not legally forbidden; 3) it was 'internal' to negotiations so it is acceptable; 4) lying is necessary and useful in negotiations; and 5) it is part of the rules of negotiation.

The findings of Wetlaufer's article seem to allude to the tensions between what is ethically permissible under the legal ethics codes, what is legally forbidden, and what is expected under generally accepted conventions of negotiation practice. Understanding these potentially conflicting sets of guidance on negotiation behaviour is critical to determining whether the rules of legal ethics can ever be successful in managing the deceptive behaviours of legal professionals in negotiation.

### 3.4 DECEPTION IN NEGOTIATION AND PERSONAL INJURY

A third source of research on the potentially deceptive behaviours of legal professionals in negotiations is Davis' 1994 Australian survey of the beliefs and attitudes of personal injury solicitors in Queensland, Australia regarding negotiation behaviour.<sup>617</sup> The table below shows some of these potentially deceptive behaviours followed by a discussion of key insights to consider from Davis' study.

**Table 3.3: Potentially Deceptive Behaviours of Personal Injury Lawyers in Negotiation (Davis 1994)**<sup>618</sup>

Note: The following is a summary chart of Davis' view of the potentially deceptive behaviours or statements used by personal injury lawyers in Australia based on his 1994 study.

Deceptive Behaviour / Statement
<ul style="list-style-type: none"> <li>▪ <u>Misrepresent the strength of your position</u> – to get a good or better negotiated result;</li> </ul>

<sup>617</sup> See Chapter 2, Section 2.5.5 (Research About Lawyers' Bargaining Behaviour) for an in-depth discussion of Davis' study.

<sup>618</sup> Adapted from Davis, above n 126.

Deceptive Behaviour / Statement
<ul style="list-style-type: none"> <li>▪ <u>Deliberately delay cases</u> – to increase the financial pressure on plaintiffs so that they become more willing to settle;</li> <li>▪ <u>Always exaggerate an offer</u>, saying it's your 'final offer'</li> </ul>

Davis' findings are specific to personal injury solicitors in Queensland, Australia. His findings on the extent to which personal injury lawyers feel they can use potentially deceptive negotiation behaviours seems consistent with adherence to acceptable forms of deception as understood or perceived through the legal ethics codes, customary negotiation practice, or negotiation theory and principles.<sup>619</sup> Davis' study found that less than 50% of the respondents actually agreed that such potentially deceptive behaviours were acceptable or necessary. However, in the context of personal injury negotiations, a substantial number of both plaintiff and defendant lawyers seem to condone some form of deception to further their client's interests, possibly in contravention of the rules of legal ethics in the prevailing jurisdiction.<sup>620</sup>

One conclusion from Davis' study could be that where duty ethics (e.g. law or legal rules) collide with community ethics (e.g. negotiation conventions) or even end-result ethics (e.g. zealous representation of clients), lawyers seem to feel that the rules of legal ethics sometimes must bow to prevailing negotiation ethics which condone certain forms of deception. For example, in Davis' study, the prevailing rules forbid any form of deception in practice. However, the results of Davis' study indicate that

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<sup>619</sup> See Chapter 2, Section 2.2.2 (Deception as a Negotiation Strategy) for more information. The findings in this study are also consistent with those of Lerman and Wetlauffer on the behaviour of lawyers in the United States.

<sup>620</sup> See, eg, *Legal Profession Act 2007* (Qld) and the *Legal Profession (Solicitors) Rules 2007* (Qld) ('Statement of general principle') which basically do not condone deception in any form and do not have exceptions the use of deception in negotiation. In this case, personal injury solicitors in this study are following customary negotiation practice because the ethics codes do not explicitly forbid the use of deception in negotiation.

personal injury solicitors in Queensland do engage in some form of deception as they find it necessary to do so in order to zealously and successfully represent their clients in personal injury matters. This demonstrates a potential clash between expected conduct under the legal ethics codes for all solicitors (no deception allowed) and the type of negotiation behaviour expected of personal injury lawyers in the same jurisdiction (some deception allowed).

As Davis point out in discussing the negotiation behaviour of personal injury lawyers in Queensland, Australia, ‘many assert that there is a difference between exaggeration, misrepresentation, and deception.’<sup>621</sup> It appears that because personal injury lawyers in Queensland perceive a difference, they condone such practices even when the legal ethics rules of the Queensland jurisdiction make no such exceptions for possible deception in negotiation.<sup>622</sup> This is an example of how overlapping and conflicting ethical standards can create an environment of acceptable yet unethical conduct within the legal profession, conduct which may go undetected and unpunished.

While such conduct may not be punished or even be considered a minor offence, the behaviour does eventually impact lawyer-client and lawyer-lawyer relationships as well as the public’s perception of lawyers, the legal profession, and the way law is practiced. As Menkel-Meadow argues, negotiation orientations can

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<sup>621</sup> Davis, above n 126, 747 (This seems to imply that lawyers are either aware of the extent to which exaggeration and misrepresentation are permissible as part of negotiations or attempting to justify their actions whilst knowing they are not permissible.).

<sup>622</sup> See, eg, *Legal Profession Act 2007* (Qld) and the *Legal Profession (Solicitors) Rules 2007* (Qld) (‘Statement of general principle’) which basically do not condone deception in any form and do not have exceptions the use of deception in negotiation. Cf *Model Rules of Professional Conduct (MRPC)*, Rule 4.2, which actually appears to condone such behaviour as long as it is not to the degree of fraud.



affect negotiation results.<sup>623</sup> In other words, one's dominant negotiation style can impact the success or results of a negotiation as well as the perceptions about the negotiator. For example, if a lawyer's negotiation orientation is adversarial, the lawyer's mindset is likely geared towards maximising individual gain at the expense of satisfying underlying needs. In turn, this means that the lawyer's behaviour is likely to be competitive, resulting in solutions which likely involve narrow compromises rather than creative solutions that address the problem holistically.<sup>624</sup>

In sum, Davis' study confirms the use of deception in personal injury negotiations among personal injury lawyers in Queensland, Australia. In addition, this study highlights the need to address the extent to which an adversarial system implicitly encourages the use of deception in personal injury negotiations through a dominant negotiation orientation. Another area of deception in negotiation is addressed under consumer protection laws such as the *Trade Practices Act, 1974* (Cth) of Australia.

### **3.5 ACTIONABLE DECEPTION AND THE *TRADE PRACTICES ACT, 1974* (Cth)**

A fourth source of information on the potentially deceptive behaviours of legal professionals in negotiations is Pengilley's analysis of how s 52 of the *Trade Practices Act, 1974* (Cth) (TPA)<sup>625</sup> might affect eight (8) common negotiating

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<sup>623</sup> Menkel-Meadow, above n 215, 759-760 (discussing 'Orientation(RA)Mind-set(RA) Behavior(RA) Results', a general model depicting the relationship between negotiation orientation (eg, adversarial) to negotiation results (e.g., narrow compromises)).

<sup>624</sup> Ibid.

<sup>625</sup> *Trade Practices Act 1974* (Cth) s 2 (stating the purpose as "to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection."). See also Australian Competition and Consumer Commission, *Professions and the Trade Practices Act* (2010) 19-20 <<http://www.accc.gov.au/content/item.phtml?itemId=926503&nodeId=71b6c165abc78f1a60f0a1643c9367&fn=Professions%20and%20the%20TPA.pdf>> at 31 July 2010 (specifically reinforcing the obligation of the professions to refrain from deceptive and misleading conduct when dealing with clients). This latter document is an updated document highlighting and reinforcing the application of the TPA on all professions in Australia, including the legal profession.

techniques of lawyers in Australia. Pengilley’s perspective is about the potentially deceptive behaviour of legal professionals in Australia as viewed by the *Trade Practices Act*.

The *Trade Practices Act* is akin to consumer protection legislation and is an important consideration in this chapter because it recognises some common legal negotiation behaviour, as found among Australian legal practitioners in this case, as potentially falling within the actionable categories of deception because the TPA’s view is that lawyers are engaged in the business of providing legal services to consumers and therefore are also subject to consumer protection laws.

Table 3.4 shows a summary of certain negotiating techniques which may now be legally actionable under section 52 of the *Trade Practices Act* (Cth) followed by a discussion of key insights.

**Table 3.4: Legally Actionable Deceptive Behaviour in Negotiation under s 52 of *Trade Practices Act* (Pengilley 1993)<sup>626</sup>**

Note: The following is a summary chart of the findings of Pengilley’s analysis of the impact of section 52 of the *Trade Practices Act* on eight common negotiating techniques. The following chart indicates those practices which are considered actionable under s 52 and thus would be considered ‘illegal’ under s 52 of the *Trade Practices Act*. Categories and behaviours are as described by Pengilley to ensure accuracy and proper credit.

Category / Sub-category	Deceptive Behaviour (Actionable Under s 52)
Exaggerations and “Product Puff”	<ul style="list-style-type: none"> <li>▪ ‘puffing’ not actionable as not considered a representation;</li> <li>▪ Objective comments involve representation and are actionable (e.g., saying something is ‘the fastest’, ‘the slowest’, ‘the heaviest’) because they can be objectively measured.</li> </ul>
Expressions of Opinion Claimed as “Opinion Only”	<ul style="list-style-type: none"> <li>▪ Negotiators claiming expertise but do not have such expertise – will be required to demonstrate and actionable if not found to be true;</li> </ul>

<sup>626</sup> Adapted from Pengilley, above n 576, 113-129 (discussing the impact of Section 52 of the Trade Practices Act on making certain negotiation techniques illegal under the act as misleading or deceptive or likely to mislead or deceive).

Category / Sub-category	Deceptive Behaviour (Actionable Under s 52)
	<ul style="list-style-type: none"> <li>Opinions stated which are not genuinely held or believed or have a basis upon rational grounds.<sup>627</sup></li> </ul>
Silence or Lack of Disclosure	<ul style="list-style-type: none"> <li>Half-truths – failing to disclose whole truth thus creating an erroneous impression is actionable;<sup>628</sup></li> <li>Actively concealing a fact that creates an impression that the fact does not exist is actionable;</li> <li>Failing to correct a false statement thus implying the statement is true is actionable;</li> <li>Failing to disclose facts when there is an obligation to do so in all circumstances is actionable</li> <li>Not disclosing or correcting representations after a change of circumstances – actionable.</li> <li>Continuing representations – if they become untrue, duty to correct representations from change in circumstances; if not corrected, then actionable as misleading or deceptive.<sup>629</sup></li> </ul>
Disclaimers Limiting or Negating Misleading Representations	<ul style="list-style-type: none"> <li>Making misleading statements or representations and then seeking to negate liability or negate the representations made via small print exclusions, general disclaimers, inconspicuous disclaimers or the like.</li> </ul>
Representations as to Financial Stability or Availability	<ul style="list-style-type: none"> <li>Making statements/representations about a party's ability to complete transactions or as to financial availability which is not accurate; overall impression created is what counts.</li> </ul>
Representations as to Particular Situation Post Agreement using 'Side Letter'	<ul style="list-style-type: none"> <li>Using side letters to conceal information from negotiating parties; side letters in and of themselves are not illegal and common in commercial transactions.</li> </ul>

<sup>627</sup> See, eg, *Stanton v ANZ Banking Group Ltd* (1987) ATPR 40-755, at 48, 193 (holding that “[a] statement which involves the state of mind of the maker ordinarily conveys the meaning (expressly or by implication) that the maker of the statement had a particular state of mind when the statement was made and, commonly at least, that there was a basis for the state of mind. If the meaning contained in or conveyed by the statement is false in that or any other respect, the making of the statement will have contravened s.52(1) of the Act.”). In *Stanton*, a bank employee who offered an opinion (represented) that a certain person “would not do the dirty to anyone” when the person did in fact “do the dirty” was found not liable for misleading or deceptive conduct because “he believed what he said, the opinion given was genuinely held, and there was no reason to suggest that the opinion was incorrect.”

<sup>628</sup> See, eg, *McMahon v Pomeroy Pty Ltd (The Balmain Nightclub Case)* (1991) ATPR 41-125 (holding that “that silence may constitute misrepresentation and will do so if its effect is to convey half-truth. If what is disclosed creates a half-truth, then there is an obligation to disclose the balance of the relevant factors so that the whole truth is available”. Here, the failure to disclose council’s limitation of hours constituted misleading or deceptive conduct.).

<sup>629</sup> See, eg, *Bikane v Netaf Pty Ltd* (1988) ATPR (Digest) 46-041 (holding that “pre-incorporation misrepresentations are thus treated as having been made to the directors after incorporation *if they are not corrected*. If post-incorporation directors are influenced by pre-incorporation misrepresentations [those not corrected] and the subsequently incorporated company enters into a contract to its detriment because of these misrepresentations, the subsequently incorporated company has an action under s.52 in respect of the misrepresentations made.”).

Category / Sub-category	Deceptive Behaviour (Actionable Under s 52)
Representations as to Fictitious Prices or Fictitious Buyers	<ul style="list-style-type: none"> <li>▪ Making representations that there are other buyers for something when, in fact, there are not to pressure buyers to “sign now” – if not true, representations are actionable.</li> <li>▪ Making representations regarding price that are not true.</li> </ul>
“Without Prejudice” Statements Made During Negotiations	<ul style="list-style-type: none"> <li>▪ Making misleading representations in negotiations then negating the statements by saying it is “without prejudice” – actionable;</li> <li>▪ Making misleading or deceptive representations at “without prejudice” conferences not protected – actionable.<sup>630</sup></li> </ul>

Pengilley’s analysis of s 52 of the *Trade Practices Act 1974* (Cth) points out several categories of negotiating behaviour by Australian lawyers that may previously have been considered acceptable but is now considered legally actionable under the TPA, outside of the legal ethics codes. With regards to the categories of potentially actionable behaviours under the *Trade Practices Act 1974* (Cth) above, two aspects are worth mentioning.

First, section 52 of the *Trade Practices Act* appears particularly relevant for attempting to control misrepresentation or lying in business practices as it prohibits businesses from ‘engage[ing] in conduct that is misleading or deceptive or likely to mislead or deceive.’<sup>631</sup> Through its broad application, section 52 certainly affects the negotiation behaviour of legal professionals, whether they are in the business of legal practice, represent businesses or engage in commercial transactions. The message of s 52 appears to be one of broad application and zero tolerance for misleading or deceptive practices.

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<sup>630</sup> See, eg, *Quad Consulting Pty Ltd v David R Bleakley & Associates Pty Ltd*. (1990), Unreported, Federal Court of Australia, No G243 of 1990 (holding that “even if negotiation conference is conducted on a ‘without prejudice’ basis, evidence that misleading or deceptive conduct was engaged in during such conference will be admissible, as ‘without prejudice’ privilege does not extend to permit conduct of this kind.”).

<sup>631</sup> Trade Practices Act 1974 (Cth) s 52.

In the context of this thesis, the TPA is one example of how legislation, either in conjunction with or apart from legal ethics codes, can impact the negotiation behaviour of legal professionals and why the profession must take steps to address this issue.

### 3.6 COMMON DECEPTIVE TECHNIQUES IN NEGOTIATION

Finally, Krivis highlights the most common, potentially deceptive tactics used by US attorneys in negotiation based on his experience in the United States.<sup>632</sup> Krivis categorises these tactics into six major areas. Some of these are common to the behaviours listed in the sections above while others are specific to Krivis' experience with primarily US lawyer-negotiators. Consistent with previous sections, Table 3.5 below highlights these categories with a brief description of the technique. This is followed by a discussion of key insights.

**Table 3.5: Deceptive Tactics Used by Attorneys in Negotiation (Krivis 2007)<sup>633</sup>**

Note: The following is a summary chart of Krivis' view of the deceptive techniques attorneys in the US most commonly use in negotiation. Categories and behaviours are as described by Krivis to ensure accuracy and clarity of the techniques as described by Krivis.

Category / Sub-category	Deceptive Techniques
Concealing the willingness to settle/ bottom line	<ul style="list-style-type: none"> <li>▪ "Conceal the bottom line as long as possible"</li> <li>▪ State that client will not accept less than one number but is happy leaving with significantly less at end of day – create/maintain doubt and uncertainty in mind of opponent;</li> <li>▪ Position himself at higher price level – thus "engaging other side in competitive match of numbers."</li> </ul>
Making inflated demands	<ul style="list-style-type: none"> <li>▪ Starting off with inflated demands as an opening offer – using concessions to get to acceptable settlement – means parties never know other side's true number.</li> </ul>

<sup>632</sup> Krivis, above n 575 (highlighting some common allegedly deceptive techniques used by attorneys in negotiations, ones that they "have come to rely on.").

<sup>633</sup> Ibid.

Category / Sub-category	Deceptive Techniques
Exaggerating strengths and weaknesses	<ul style="list-style-type: none"> <li>▪ Exaggerating strength of own case to pressure other side to make more and/or later concessions;</li> <li>▪ Exaggerating weakness of opponent's case;</li> <li>▪ Exaggerating on issues of speculation and opinion of value,</li> </ul>
Concealing client intentions	<ul style="list-style-type: none"> <li>▪ Playing a 'game of hide and seek' to keep party uncertain about what client truly values – to place higher value on certain items.</li> </ul>
Claiming lack of authority	<ul style="list-style-type: none"> <li>▪ Claiming attorney lacks full settlement authority even when he/she does – used to “force the opponent to lose confidence in himself/herself and maybe settle for less;</li> <li>▪ Improving bargaining position by claiming lack of authority so they may not have to make a further concession.</li> </ul>
Failing to volunteer relevant facts	<ul style="list-style-type: none"> <li>▪ Not revealing certain information which attorneys are not required to disclose under professional rules of ethics;</li> <li>▪ Withholding information that attorney has right to withhold – while may be dishonest, also not generally considered 'unacceptable'.</li> </ul>

Kravis' view of the most common deceptive techniques used by lawyers in the United States<sup>634</sup> is based on several important factors as to why lawyers might engage in as well as attempt to justify the use of potentially deceptive behaviour.

One key factor for why lawyers might engage in deceptive behaviour is the competitive market in which the business of law takes place, where even professional standards seem to come under attack. This is often an overlooked aspect of rendering legal services to clients. While it is true that law traditionally has been viewed as an elite profession that provides a type of social service to the public, today it is most

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<sup>634</sup> Note: Kravis' article pertains primarily to lawyers in the United States. However, these would most likely apply to lawyers in most common law jurisdictions operating under the adversarial system of justice.

likely seen as simply a service unlike any other service purchased by consumers in a competitive, market-driven economy.<sup>635</sup>

As Krivis points out, ‘competition in our society promotes an atmosphere of freedom of choice and enables buyers and sellers to define the limits of acceptability.’<sup>636</sup> As argued by many, it is this same competitive, market-driven economy that is negatively impacting the revered and high professional standards that both lawyers and the public expect of a profession designed to serve the public good.<sup>637</sup> In addition, this same competitive environment rewards those who get the best deal and are able to do so within the limits of acceptability. If competition and profit are key drivers, and competition is conducted with an adversarial mind-set, the limits of acceptable conduct may change both within the legal system and within the society that receives these legal services. It may allow for certain deception in negotiation or other areas of legal practice as long as it does not cross the limits of acceptability. As Terry notes, the combination of globalisation and the lawyers-as-service-providers paradigm may cause lawyers to be subject to regulation from more and more entities.<sup>638</sup>

A second key factor in lawyers using deception is that lawyers who operate within this competitive environment attempt to get the best deal for their client. Krivis compares litigation to ‘a game of cards’ where the best hand wins and where

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<sup>635</sup> See, eg, Terry, above n 548, 190-193 (discussing the new paradigm of lawyers as ‘service providers’ and the ramifications on the legal profession). Cf Kronman, above n 547; Davis, above n 171.

<sup>636</sup> Adapted from Krivis, above n 575.

<sup>637</sup> See, eg, The Honourable Justice Michael Kirby AC CMB, *Legal Professional Ethics in Times of Change* (1996) <[http://www.hcourt.gov.au/speeches/kirbyj/kirbyj\\_stjames2.htm](http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_stjames2.htm)> at 9 August 2010; Merritt, above n 560, 2.

<sup>638</sup> Terry, above n 548, 205-208 (discussing the ramifications of the ‘service provider’ paradigm for legal services in the future). Terry argues that lawyers should embrace this change or risk being “marginalized in a world it does not know or understand and much of its rules arguments could be viewed by others as irrelevant.” (Ibid at 208).

negotiations especially are a matter of '[t]echnique and skill' rather than a great hand and where a 'good card player can improve his winnings if the other player overestimates his hand.'<sup>639</sup> This is commonly associated with a distributive model of negotiations where the 'poker player' bargaining ethic prevails. This 'poker player' ethic relies on certain forms of deception.<sup>640</sup>

In addition, the distributive model of negotiation is common and acceptable such that lawyers who do not, at some point, engage in value-claiming, may find themselves getting a lesser bargain than their client anticipates. Regardless of whether lawyers operate within a public-service paradigm of legal practice or under a more market-driven, service-provider paradigm, it is reasonable to conclude that if lawyers continue to think of and conduct legal negotiations with this competitive, distributive mindset, then deception in negotiation will continue unless there is some intervention in the form of policy reforms.

In summary, Krivis' US-centric view of the common deceptive negotiation behaviour by lawyers is consistent with those described by Lerman and Wetlauffer in the U.S. context as well as those discussed by Davis and Pengilley in the Australian context. Krivis' assessment is important in understanding the underlying pressures and interests which drive such behaviour in legal negotiations and informs how ethics may best play a part in controlling such behaviour. Furthermore, while the studies are from different legal jurisdictions, it is important to note that they involve the same common-law system where the tasks and pressures faced by lawyers are similar. As such, these findings could be extrapolated to other areas of the same common law

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<sup>639</sup> Adapted from Krivis, above n 575.

<sup>640</sup> See Chapter 2, Section 2.3.6 (Theories of Bargaining Ethics) for a detailed discussion on this topic.



system as well as to other common law jurisdictions. The next section provides a perspective of deceptive conduct as viewed under formal legal classifications.

### 3.6.1 Legal Classifications of Deceptive Conduct

As discussed in Chapter 2, some scholars and practitioners see a distinction in definitions of lying and deception with regards to how they are applied to legal practitioners.<sup>641</sup> These distinctions likely represent gradations in how law might view certain types of deception and lies, gradations which do not appear formally in the legal ethics codes. The following table contains results adapted and extracted from the technical, legal definitions of certain types of deception.

**Table 3.6: Legal Terms of Deception**

Note: The chart below describes various potentially deceptive practices, definitions and related behaviours or conduct as may be manifested during legal negotiations, with the intent of using legal terminology to define such behaviour, where applicable. Some have potentially greater legal ramifications than others for the parties involved yet nearly all of them have grave ramifications for the legal practitioner who is found to have committed an ethical violation involving these practices.

Term	Technical Definition	Conduct/Behaviour
Falsification	Introducing factually erroneous information into the negotiation <sup>642</sup>	<ul style="list-style-type: none"> <li>• Knowingly using false or outdated documents;</li> <li>• Falsified financial statements;</li> <li>• False statements of the parties.</li> </ul>
Fraud (General)	‘An intentional dishonest act or omission done with the purpose of deceiving.’ <sup>643</sup> Deception used for personal gain – can be a civil law violation and a criminal act whereby the crime is of	Causing someone to falsely witness a will for personal gain; Deceiving someone to transfer property or services; Negotiator knows what he is doing is against the law,

<sup>641</sup> See, eg, Guernsey, above n 34, 105 (stating that a lawyer’s definition of lying may be stated as “a statement made with the intent to deceive which purports to state the existence, in unequivocal terms, of facts and law contrary to the declarant’s express knowledge.”).

<sup>642</sup> Adapted from Lewicki et al, above n 128, 168-170.

<sup>643</sup> Butterworths Concise Australian Legal Dictionary, above n 643, 182.

Term	Technical Definition	Conduct/Behaviour
	deliberately deceiving another in order to damage them by, for example obtaining property or services	knowingly and intentionally deceives someone into thinking it is legal and achieves personal gain illegally
Fraud in the inducement	Use of deceit or trick to cause someone to act to his/her disadvantage; misleading other party as to the facts upon which the decision is made	<ul style="list-style-type: none"> <li>• Signing away a deed to property based on fraudulent information;</li> <li>• Signing agreement based on fraudulent figures;</li> <li>• “there will be tax advantages if you let me take title to your property”;</li> <li>• You don’t have to read the rest of the contract-it is just routine language” where it contains a huge balloon payment;</li> <li>• Where person signs a contract but the consent is induced by the fraud of another party.</li> </ul>
Fraud in the inception	When a party is deceived concerning the nature of his or her acts and does not know what he/she has signed and does not intend to enter into a contract	<ul style="list-style-type: none"> <li>• A person who does not read relies on representations of another party that they are just signing a receipt when actually it is a release; Grantor of deed does not realise that s/he is signing a deed as formal instrument because of fraud of another – deed is void.</li> </ul>
Fraud in the factum	Where the deception causes the other party to misunderstand the nature of the transaction in which he or she is engaging	Altering the language of a contract or promissory note after the fact.
Lie / Lying by commission	1) false statement made with the intent to deceive; an intentional untruth; <sup>644</sup> 2) “all means by which one might attempt to create in some audience a belief at variance with one’s own.” <sup>645</sup> 3) one can lie by derailing (change	<ul style="list-style-type: none"> <li>• Change the subject to avoid the truth;</li> <li>• Pretend to be offended in order to stop a conversation about one’s questionable actions;</li> <li>• Deliberately use ambiguity</li> </ul>

<sup>644</sup> *The Random House Dictionary of English Language*, above n 33, 1109.

<sup>645</sup> Wetlaufer, above n 31, 1223.

Term	Technical Definition	Conduct/Behaviour
	subject), confusing (being ambiguous), misinforming (invent false story), or bluffing.	to deceive or mislead or confuse the issue; <ul style="list-style-type: none"> <li>• Invent or perpetuate a false story to deceive or mislead.</li> </ul>
Lying by omission	Allowing another person to believe something to be true that one believes to be false by deliberately failing to reveal one's belief; 2) remain silent and thereby withhold a vital piece of information can sometimes be a lie by omission; subverts the truth	<ul style="list-style-type: none"> <li>• "Have you ever smoked marijuana?" – you remain silent or do not reveal whole truth;</li> <li>• Political 'spin doctors' – who intentionally speak only part of the truth.</li> </ul>
Misleading	A person tells a statement that is not an outright lie but still has the purpose of making someone believe in an untruth	<ul style="list-style-type: none"> <li>• Negotiator stating that he or she does not have the authority to make a settlement decision or comment on an offer even though they have some authority</li> </ul>
Misrepresentation	A false statement of material fact, with the intent to deceive, which is reasonably relied on by another person, to that person's detriment.	<ul style="list-style-type: none"> <li>• Statement of fact with no reasonable basis to make the statement;</li> <li>• A promise of future performance made with intent not to perform as promised;</li> <li>• Statement of opinion based on a false statement of fact;</li> <li>• Expression of opinion that is false by one claiming or implying to have special knowledge of the subject matter (e.g. A doctor, lawyer);</li> <li>• Statement of opinion that the person knows to be false.</li> </ul>
Innocent misrepresentation	'A false statement or conduct which induces a party to enter a contract but which is not made or done with intent to deceive.' <sup>646</sup> The person believes it to be true and has	A negotiation agreement which contains the value of certain property known believed to be accurate at the time but later is shown as inaccurate.

<sup>646</sup> Butterworths Concise Australian Legal Dictionary, above n 643, 224.

Term	Technical Definition	Conduct/Behaviour
	reasonable grounds to believe it is true.	
Fraudulent misrepresentation	‘A false statement of fact, made by a person who does not believe the truth of the statement or is recklessly indifferent to whether it is true, to another with the intent that the other person will rely on it.’ <sup>647</sup>	<ul style="list-style-type: none"> <li>An agreement which contains an assessment of the value of a list of property to be transferred that is presented as true without first verifying this information through formal valuation.</li> </ul>
Negligent misrepresentation	‘A statement of fact, advice, or opinion made in a business context which is inaccurate or misleading.’ <sup>648</sup> When the representation is made carelessly while having no reasonable reason for believing it to be true.	<ul style="list-style-type: none"> <li>Lawyer who may provide an inaccurate assessment of the value of a case to the plaintiff;</li> <li>An accountant who provides an inaccurate financial statement even where he believes it to be valid.</li> </ul>
Perjury	Not the same as lying since it does not require intent to deceive; it is a ‘false statement on oath in a judicial proceeding concerning a matter material to the proceeding, while knowing that the statement is false, or not believing it to be true.’ <sup>649</sup> one can lie under oath without perjuring oneself and one can perjure oneself without lying.	<ul style="list-style-type: none"> <li>Stating the value of a case under oath which is known to be inconsistent with one’s professional judgment or documents discussed in for example, another setting.</li> </ul>
Puffery	‘Representation, statement, or conduct that clearly over-exaggerates the attributes or characteristics of some product or service and is not intended to be an offer to be relied on.’ <sup>650</sup>	<ul style="list-style-type: none"> <li>Over-exaggerating the value of a case;</li> <li>Over-stating the value of a particular product or service up for negotiation.</li> </ul>

<sup>647</sup> Butterworths Concise Australian Legal Dictionary, above n 643, 182.

<sup>648</sup> Butterworths Concise Australian Legal Dictionary, above n 643, 292.

<sup>649</sup> Butterworths Concise Australian Legal Dictionary, above n 643, 326.

<sup>650</sup> Butterworths Concise Australian Legal Dictionary, above n 643, 354.

### **3.6.2 Summary Analysis of Lawyers' Most Common Deceptive Behaviours in Negotiation**

To date, the information in this chapter shows that some lawyers appear to use many common, yet potentially deceptive behaviours, even in negotiation. These behaviours, in some cases, appear to be considered not only legally acceptable but also acceptable under certain legal ethics codes and community standard of legal negotiation behaviour, such as in the case of personal injury cases.

In reviewing these negotiation behaviours, it is important to keep two things in mind. First, lawyers do work under certain sets of rules and codes of conduct in the adversary system that seems to allow for and encourage behaviour that may be perceived as deceptive and dishonest. In addition, as stated in Chapter 1, some lawyers may engage in transactional or non court-related work, such as document production, that does not involve negotiation or issues related to deception in negotiation.

The second point worth noting is nearly all of the alleged deceptive behaviours relate directly or indirectly to the structure of how most law firms operate, namely the billable hour paradigm – or as stated by Lerman, the ‘profit motivation’<sup>651</sup> factor at the heart of most law firms and most businesses. Nearly all the categories of deception in the existing literature can be linked to lawyers attempting to meet minimum billable hour requirements so as to maintain their jobs, seek promotions, live a particular lifestyle, pay debts, and remain employed. In addition, even where

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<sup>651</sup> Lerman, above n 60, 671-672, 755-756 (stating that “the engine that drives the machine is profit motivation.”). See also Herbert M Kritzer, ‘The Dimensions of Lawyer-Client Relations: Notes Toward a Theory and A Field Study’ (1984) *American Bar Foundation Research Journal* 409, 410 (confirming the conclusion of recent studies that “what is in the lawyer's economic interest may not be in the client's interest”); Thomas D Morgan, ‘The Evolving Concept of Professional Responsibility’ (1977) 90 *Harvard Law Review* 702, 706-712 (discussing the conflicting aspects of the Code of Professional Responsibility in appearing to give priority to the lawyers' interests over the interests of clients and the public).

more truthful, or at least less deceptive, options exist, the research seems to show that lawyers will continue to engage in certain deceptive behaviours and attempt to justify it based on their perception that the legal ethics rules permit such conduct.<sup>652</sup>

As the American Bar Association (ABA) Section on Litigation study pointed out, the qualities which the public attributes to lawyers as positive (e.g. aggressiveness, competence in their knowledge of the law and applying it in service of the client, competitive)<sup>653</sup> may be the same qualities which lead to public perceptions of lawyers being greedy and manipulative.<sup>654</sup> This seems consistent with the distinctions between the primarily distributive and integrative models of bargaining, as well as Williams' findings on the characteristics of cooperative/effective versus competitive/effective negotiators.<sup>655</sup>

The adversarial model of justice that is so prevalent in nearly all common law jurisdictions appears to adopt a near-strict distributive bargaining model as seen by the literal reading of codes and rules.<sup>656</sup> Distributive bargaining is a competitive, fixed pie, win-lose model of negotiation in which deception is the informational bargaining chip.<sup>657</sup> It is a game mentality in which winner takes all. If winner take all is still the primary *modus operandi* of most law firms and endorsed by the profession and the courts, then deception in negotiation is likely to be considered acceptable

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<sup>652</sup> See, eg, Lerman, above n 60, 745-749 (discussing this point in greater detail and looking at whether deception can be regulated given the reality of the profession).

<sup>653</sup> American Bar Association Section of Litigation, *Public Perception of Lawyers: Consumer Research Findings*, above n 13, 17-20.

<sup>654</sup> American Bar Association Section of Litigation, *Public Perception of Lawyers: Consumer Research Findings*, above n 13, 7-16

<sup>655</sup> Williams, above n 202, 20-26.

<sup>656</sup> Menkel-Meadow, above n 215, 765-768.

<sup>657</sup> Menkel-Meadow, above n 215, 765-768; Williams, above n 202, 20-26; Menkel-Meadow, above n 19, 775-780 (describing various scenarios where lawyers may use deception in practice).

behaviour, consistent with the findings as presented by scholars and the recent ABA study.

### 3.7 CHAPTER CONCLUSION

A lawyer stated through an Internet blog that '[w]hat lawyers believe about practicing law has a huge impact on how we behave, and how we behave has significant influence on how we are perceived.'<sup>658</sup> In other words, if lawyers feel they must deceive or mislead others in the practice of their profession in order to be effective and successful,<sup>659</sup> the public's perception of lawyers will tend to confirm this notion. To extrapolate further, if a lawyer's 'bread and butter' on a daily basis involves some form of negotiation and he/she believes that deception is appropriate and condoned in these interactions, then this has an enormous impact on how he/she views the practice of law and the profession as well as how such views are manifested in his/her interactions with all major stakeholders of the legal system.

This chapter presented the results of several anecdotal studies and practitioner insights, both from the United States and Australia, which confirms that lawyers do engage in deceptive behaviour in general as well as in negotiations. The results of Lerman's small-scale anecdotal study almost mirror the American Bar Association Section on Litigation's study.<sup>660</sup> In addition, Wetlaufer, Davis, and Krivis confirm the potentially deceptive behaviour by lawyers in negotiation. It is ironic that given the opportunity, lawyers are honest about their alleged dishonesty even if they disagree that such behaviour is really dishonest, particularly where the legal ethics codes are

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<sup>658</sup> *Public perception of lawyers* (2006) <<http://lifeatthebar.wordpress.com/2006/10/25/public-perception-of-lawyers/>> at 9 August 2010.

<sup>659</sup> This might apply to any profession but affects lawyers more than most because of their standing in the community.

<sup>660</sup> American Bar Association Section of Litigation, *Public Perception of Lawyers: Consumer Research Findings*, above n 13.

concerned. The majority of professional ethics codes studied in this thesis<sup>661</sup> dictate that lawyers shall not lie or deceive under any circumstance but current research reveals that lawyers can and do, whether they wish to or not.

The next chapter addresses the second research question, namely whether professional ethics codes address and provide an enforcement mechanism to control deceptive behaviour by lawyers in negotiation. The focus of Chapter 4 is a cross-jurisdictional analysis of the professional ethics codes in select common-law legal jurisdictions, rules designed to regulate lawyers' behaviours in practice.

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<sup>661</sup> See Chapter 4 (Efforts by Professional Ethics Codes to Regulate Deceptive Behaviour in Negotiation) for a detailed discussion on this topic.



## **CHAPTER 4 – EFFORTS BY PROFESSIONAL ETHICS CODES TO REGULATE DECEPTIVE BEHAVIOURS IN NEGOTIATION**

*‘...there is such a gap between how one lives and how one ought to live that anyone who abandons what is done for what ought to be done learns his ruin rather than his preservation.’*

*~ Niccolo Machiavelli<sup>662</sup>*

This chapter describes and evaluates the results of the qualitative research regarding the second research question. The second research question focuses on the ways in which professional ethics codes attempt to regulate lawyers’ behaviour, in general, and, in particular, the potentially deceptive behaviour of lawyers in negotiation. An evaluation of the professional ethics codes is important since these ethics codes are meant to provide guidance on how lawyers ought to behave in the various areas of legal practice. The following sections provide an international and Australian perspective on the ways in which the professional ethics codes attempt to regulate deceptive behaviour. The chapter concludes with a cross-jurisdictional, comparative analysis of the various legal ethics codes and a summary of insights gained from this analysis. The insights demonstrate the need for a strategic set of policy reforms, as outlined in Chapter 7, to better align the intent of the professional ethics codes and the successful management of the potentially deceptive behaviour of lawyers in negotiation.

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<sup>662</sup> Niccolo Machiavelli, *The Prince* (1515) 52. Machiavelli is quoted as being well-known for advocating deceptive tactics and a win-lose mentality. In many respects his advice is contrary to what the legal ethics codes advocate for attorneys yet, even today, these tactics are used in many areas, especially business, and advocated by some legal scholars. See, eg, White, above n 60; Carr, above n 532; Strudler, above n 67.

## 4.1 INTRODUCTION

The quote by Machiavelli seems to sum up the tension inherent between how lawyers tend to practice and the seemingly more stringent ethics rules under which lawyers are expected to practice. This is particularly evident in the case of negotiations where the intersection between business and the profession of law collide with what is ethically appropriate and permissible. For lawyers, what is ethically permissible is generally based on guidelines provided in the legal ethics code. The purpose of this chapter is to discuss the findings of the second research question, namely the manner in which legal ethics codes attempt to control the potentially deceptive negotiation tactics used by legal professionals. Once again, as stated in Chapter 1, section 1.6, this study acknowledges that there may be other jurisdiction-specific statutory controls on negotiation behaviour. These are considered out of scope for the purposes of this thesis and this study. The focus of this study and this chapter is on the legal ethics codes to which every practicing lawyer is subject as a member of the legal profession.

Legal ethics and the codes of professional conduct provide the rules and guidelines by which lawyers are expected to conduct their daily practice.<sup>663</sup> Each common law legal jurisdiction generally has its own code of professional conduct. In addition, there may be national codes of professional conduct which are adopted at the state level, and sometimes adapted, by each major jurisdiction. For example, in the United States, the American Bar Association's *Model Rules of Professional Conduct* is approved by a national body and adopted by nearly all individual states except for

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<sup>663</sup> See, eg, Wolski, above n 124, 22-26.

California which has elected to use a state-specific professional code of conduct.<sup>664</sup> Similarly, in Australia, the Australian legal profession is currently regulated at the state and territory level.<sup>665</sup> These professional codes of conduct are meant to not only provide rules of engagement with clients, dealings with other lawyers, and rules of legal practice, but also how a legal professional is to behave in key aspects of their profession, such as when acting as a prosecutor, mediator, arbitrator, or judge. A violation of an ethics code or rule generally results in disciplinary action by the professional association of that jurisdiction. Appeals may be heard by the Court of Appeal of the relevant jurisdiction.<sup>666</sup>

One of the most consistent rules of professional conduct appears to be that a lawyer shall not lie or engage in deceptive or misleading conduct. However, the extent to which this particular directive is stressed seems to vary with each legal jurisdiction and with each unique function of a lawyer as demonstrated by the actual provisions within the codes of professional conduct.

In an attempt to determine whether the legal ethics codes address the issue of deception in negotiation, it is important to conduct an assessment of these ethics codes. A cross-jurisdictional evaluation is necessary as a means to compare how various legal jurisdictions handle a commonly-known problem. In addition, a cross-jurisdictional perspective aids in determining commonalities and inconsistencies

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<sup>664</sup> American Bar Association Center for Professional Responsibility, *ABA Model Rules of Professional Conduct: State Adoption of Model Rules* (2009) <[http://www.abanet.org/cpr/mrpc/model\\_rules.html](http://www.abanet.org/cpr/mrpc/model_rules.html)> at 9 August 2010.

<sup>665</sup> Mary Ann Noone and Judith Dickson, 'Teaching Towards a New Professionalism: Challenging Law Students to Become Ethical Lawyers' (2001) 4(2) *Legal Ethics* 127, 128-129. Cf Council of Australian Governments (COAG), *National Legal Profession Reform* (2009) <<http://www.ag.gov.au/legalprofession>> at 9 August 2010 (providing a history and task force papers related to reforms aimed at having uniform regulation of the legal profession in Australia).

<sup>666</sup> Note: Here it is important to note that there is a difference between law and ethics as noted by several scholars. This is also further discussed in Chapter 2 (Review of Literature).

across legal ethics codes that form part of the same legal system, namely the common-law system as is the focus of this thesis. This comparative analysis provides greater insight and decision-making clout to professional associations and governmental bodies when considering the policy reform proposals discussed in Chapter 7, regardless of whether a given jurisdiction faces the issues discussed in this thesis.

The next sections of this chapter describe and evaluate a representative sample of legal ethics codes in select common law jurisdictions. The following countries were part of this representative sample due to potential geographic, legal and cultural differences, however slight: 1) Australia; 2) Canada; 3) United States; and 4) Hong Kong. Each section lists the key provisions of the jurisdiction's legal ethics code that deals with a prohibition or conditional prohibition of deceptive conduct by lawyers. Particular attention is given to those provisions which specifically address the negotiation process and guidelines for negotiation behaviour, especially the use of deception in negotiation. Each section is also followed by a discussion of key insights. The comparative analysis begins with an international perspective and continues with a primary focus on select Australian jurisdictions.

#### **4.2 INTERNATIONAL PERSPECTIVES: UNITED STATES, CANADA, HONG KONG**

This section presents a comparative analysis of the legal ethics codes of three international, common-law jurisdictions, namely the United States, Canada, and Hong Kong.

The subject of the first analysis is the United States and the American Bar Association's *Model Rules of Professional Conduct*. The American Bar Association's *Model Rules of Professional Conduct* (MRPC or ABA Model Rules) are considered the professional ethics rules of the U.S. legal profession. The ABA Model Rules

indicate the standard of conduct expected of all lawyers nationally. The MRPC has been adopted in whole or in part by all states of the United States, except California.<sup>667</sup> Until December 2008, New York retained the Model Code of Professional Responsibility (MCPR)<sup>668</sup> while both California and Maine drafted and adopted their own set of rules of legal ethics and professional responsibility.<sup>669</sup> However, New York adopted the MRPC as of 16 December 2008 while Maine elected to adopt the MRPC as of 26 February 2009,<sup>670</sup> leaving California as the only state in the United States to retain its own state-specific set of professional responsibility rules.<sup>671</sup>

The following table represents some of the key provisions of the ABA Model Rules as they pertain to regulating deceptive conduct. Certain provisions of the ABA Model Rules, such as Model Rule 4.1, are especially relevant as they outline acceptable negotiation behaviour and are the subject of much scholarly debate. A brief analysis follows Table 4.1

**Table 4.1: United States: Sample American Bar Association *Model Rules of Professional Conduct* (MRPC or ABA Model Rules) Regarding Deceptive and Misleading Conduct<sup>672</sup>**

Model Rule	Description
Model Rule 1.5a (Fees)	(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.

<sup>667</sup> See generally *ABA Model Rules of Professional Conduct: State Adoption of Model Rules*, above n 6665.

<sup>668</sup> American Bar Association Center for Professional Responsibility, *ABA Model Rules of Professional Conduct: Dates of Adoption* (2009) <[http://www.abanet.org/cpr/mrpc/chron\\_states.html](http://www.abanet.org/cpr/mrpc/chron_states.html)> at 9 August 2010.

<sup>669</sup> See generally *ABA Model Rules of Professional Conduct: State Adoption of Model Rules*, above n 665. New York initially adopted the *Model Code of Professional Responsibility* and has recently accepted the *Model Rules of Professional Conduct*, California's Supreme Court has adopted the *California Rules of Professional Conduct*, and Maine has adopted its own *Code of Professional Responsibility*.

<sup>670</sup> *ABA Model Rules of Professional Conduct: Dates of Adoption*, above n 669.

<sup>671</sup> *ABA Model Rules of Professional Conduct: State Adoption of Model Rules*, above n 665.

<sup>672</sup> See generally American Bar Association Center for Professional Responsibility, *Model Rules of Professional Conduct*, above n 293.

Model Rule	Description
Model Rule 1.6 (Confidentiality of Information)	(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
Model Rule 1.16 (Declining or Termination Representation)	(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:  ... (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or <i>fraudulent</i> ; (emphasis added)  (3) the client has used the lawyer's services to perpetrate a crime or <i>fraud</i> ; (emphasis added)
Model Rule 2.1 (Advisor)	In representing a client, a lawyer shall exercise independent professional judgment and render <i>candid</i> advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation. (emphasis added)
Model Rule 3.1 (Meritorious Claims And Contentions)	A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a <i>good faith</i> argument for an extension, modification or reversal of existing law. (emphasis added)
Model Rule 3.3 (Candor Toward The Tribunal)	(a) A lawyer shall not knowingly:  (1) make a <i>false</i> statement of fact or law to a tribunal or fail to correct a <i>false</i> statement of material fact or law previously made to the tribunal by the lawyer; (emphasis added)  (3) offer evidence that the lawyer <i>knows to be false</i> . If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer <i>reasonably believes is false</i> . (emphasis added)
Model Rule 3.4 (Fairness To Opposing Party And Counsel)	A lawyer shall not:  (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;  (b) <i>falsify evidence</i> , counsel or assist a witness to <i>testify falsely</i> , or

Model Rule	Description
	offer an inducement to a witness that is prohibited by law; (emphasis added)
Model Rule 3.8 (Special Responsibilities Of A Prosecutor)	<p>....(g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:</p> <p>(1) promptly <i>disclose</i> that evidence to an appropriate court or authority, and</p> <p>(2) if the conviction was obtained in the prosecutor's jurisdiction,</p> <p style="padding-left: 40px;">(A) <i>promptly disclose</i> that evidence to the defendant unless a court authorizes delay, and.... (emphasis added)</p>
Model Rule 4.1 (Truthfulness In Statements To Others)	<p>In the course of representing a client a lawyer shall not knowingly:</p> <p>(a) make a <i>false statement</i> of material fact or law to a third person; or</p> <p>(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6. (emphasis added)</p> <p>Comment [1] - A lawyer is required to be truthful when dealing with others on a client's behalf, <i>but generally has no affirmative duty to inform an opposing party of relevant facts</i>. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer <i>knows is false</i>. Misrepresentations can also occur by partially true but <i>misleading statements or omissions</i> that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4. (emphasis added)</p> <p>Comment [2] - This Rule refers to <u>statements of fact</u>. Whether a particular statement should be regarded as one of fact can depend on the circumstances. <i>Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact</i>. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers</p>

Model Rule	Description
	should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation. <sup>673</sup> (emphasis added)
Model Rule 7.1 (Communications Concerning A Lawyer's Services)	A lawyer shall not make a <i>false or misleading communication</i> about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading. (emphasis added)
Model Rule 8.1 (Bar Admission And Disciplinary Matters)	An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:  (a) knowingly make a <i>false statement of material fact</i> ; or  (b) <i>fail to disclose a fact</i> necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.
Model Rule 8.2 (Judicial And Legal Officials)	(a) A lawyer shall not make a statement that the lawyer knows to be <i>false or with reckless disregard as to its truth or falsity</i> concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office. (emphasis added)
Model Rule 8.4 (Misconduct)	It is professional misconduct for a lawyer to:  (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;  (b) commit a criminal act that reflects <i>adversely on the lawyer's honesty, trustworthiness</i> or fitness as a lawyer in other respects;  (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;...

Table 4.1 presented several key provisions of the ABA MRPC that pertain to regulating deceptive and misleading lawyer conduct, with a focus on any provisions

<sup>673</sup> Note: Model Rule 4.1 is the one most often cited and debated as permitting deception in negotiations because of the Comment as italicised above. Attempts to amend this provision have gone unheeded for the last ten-to-twenty years.



which specifically discuss negotiation behaviour. Several points are worth noting about the ABA Model Rules.

First, each of these rules specifies an affirmative duty for the lawyer. The affirmative duty may be to the client, the tribunal,<sup>674</sup> to the opposing party and counsel, or to a third person. The affirmative duty is denoted by the use of ‘shall’ in each of the directive statements above. Similar phrases which designate a duty to perform an obligation include ‘must’ or ‘is required to’. In each of the model rules pertaining to potentially deceptive conduct, the words on the face of the statute indicate a duty to *not* engage in such conduct. Interestingly, the duty is owed to a specific stakeholder as evidenced by a literal reading of the rules.

Second, despite the fact that each of the rules appears to designate a specific stakeholder to whom the duty is owed, Rule 8.4 appears all-encompassing and broad with regards to professional misconduct since it appears that *any* ‘conduct involving dishonesty, fraud, deceit or misrepresentation’<sup>675</sup> is subject to a potential finding of professional misconduct, regardless of whether the rule on its face applies to a particular stakeholder.

Third, the ABA Model Rules specifically states that certain behaviour in negotiations is exempt from being considered ‘material’ for the purposes of being treated as an ethical violation of the ABA Model Rules. According to ABA Model Rule 4.1, estimates of price or value, acceptable settlement offers, and the existence of an undisclosed principal in the context of negotiations are not subject to the same

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<sup>674</sup> *Model Rules of Professional Conduct (MRPC)*, Rule 1.0 (m) (defining tribunal as “a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity.”).

<sup>675</sup> See generally *Model Rules of Professional Conduct (MRPC)*, Rule 8.4.

rules.<sup>676</sup> Furthermore, these three exceptions are not all inclusive but simply some of the exceptions which are 'ordinarily in this category' of 'generally accepted conventions in negotiations',<sup>677</sup> which are not actionable. There appears to be wide latitude and acknowledgment of certain potentially deceptive yet acceptable behaviours in negotiation that lawyers might have to engage in during the course of practice. This provision demonstrates the integration of duty ethics with community ethics combined with some pragmatism as evidenced by the comments to Rule 4.1, which advise lawyers to be 'mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.'<sup>678</sup> This cautionary provision appears to be aimed at requiring lawyers to ensure that they mitigate any negative impact on the reputation of the legal profession.

In the context of this thesis, the selected provisions of the ABA Model Rules appears to allow for a certain level of permissible deception in negotiation that does not cross the boundaries of tortious or criminal sanctions.

Next, the focus is on Canada. The Canadian Bar Association's *Code of Professional Conduct* (the CBA Code) provides the professional ethics guidelines for lawyers in Canada. Under the CBA Code, a lawyer is defined as 'an individual who is duly authorized to practise law'<sup>679</sup> and includes not only to those 'engaged in private practice but also to those who are employed by governments, agencies, corporations and other organizations.'<sup>680</sup> In Canada, much like the United States, the professions of barrister and solicitor are fused and referred to as 'lawyers' or 'legal

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<sup>676</sup> See generally *Model Rules of Professional Conduct* (MRPC), Rule 4.1 (comment).

<sup>677</sup> See generally *Model Rules of Professional Conduct* (MRPC), Rule 4.1.

<sup>678</sup> See generally, *Model Rules of Professional Conduct* (MRPC), Rule 4.1, comment [2].

<sup>679</sup> See generally, *Canadian Bar Association Code of Professional Conduct* (2006) xiv <<http://www.cba.org/CBA/activities/code/>> at 9 August 2010.

<sup>680</sup> *Canadian Bar Association Code of Professional Conduct* (2006), above n 679, xiv. The CBA Code defines 'legal professional' as "lawyers collectively".

professionals'. The CBA Code applies to all Canadian territories, the exception of the province of Quebec, which operates under the civil law tradition and maintains the distinction of lawyers and defines them as either 'attorneys' or 'civil-law notaries'.<sup>681</sup> In Quebec, attorneys are much like those in the United States and operate both as a trial lawyer and a case lawyer. As such, the discussions regarding Canada are focused primarily on those provinces, excepting Quebec, which still practice under the common-law system.

The following table, Table 4.2, lists some of the key provisions of the CBA Code as they pertain to regulating deceptive conduct. A brief discussion follows the list of provisions.

**Table 4.2: Canada: Sample Rules of the Canadian Bar Association *Code of Professional Conduct* (2006)<sup>682</sup> Regarding Deception and Misleading Conduct**

Rule	Description
Chapter 3 (Advising Clients)	The lawyer must be both <i>honest and candid</i> when advising clients. (emphasis added)
Chapter 3, Rule 7 (Dishonesty or Fraud by Client)	When advising the client the lawyer must never knowingly assist in or encourage any <i>dishonesty</i> , fraud, crime or illegal conduct, or instruct the client on how to violate the law and avoid punishment. The lawyer should be on guard against becoming the tool or dupe of an unscrupulous client or of persons associated with such a client. (emphasis added)
Chapter 9, Rule 1 (Guiding Principle)	The advocate's duty to the client "fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case" and to endeavour "to obtain for his client the benefit of any and every remedy and defence which is authorized by law" <sup>2</sup> must always be discharged by fair and honourable means, without illegality and in a manner consistent with the lawyer's

<sup>681</sup> See generally Pawel Laidler, 'The Distinctive Character of the Quebec Legal System' (2004) in M Paluszkiwicz-Misiaczek, A Reczynska, A Spiewak (eds), *Place and Memory in Canada: Global Perspectives* (2005).

<sup>682</sup> See generally *Canadian Bar Association Code of Professional Conduct*, above n 679. The CBA Code distinguishes between the lawyer's function as advocate, prosecutor, mediator, and arbitrator. The Code also specifically has 'Principles of Civility for Advocates' (Appendix) and a provision for 'Courtesy', a violation of which may cause the legal practitioner to be subject to disciplinary action (Chapter 9, Rule 16).

Rule	Description
	<i>duty to treat the court with candour, fairness, courtesy and respect. (emphasis added)</i>
Chapter 9, Rule 2 (Prohibited Conduct)	<p>The lawyer must not, for example:</p> <p>(b) knowingly assist or permit the client to do anything that the lawyer considers <i>to be dishonest or dishonourable</i>;...</p> <p>(e) knowingly <i>attempt to deceive or participate in the deception</i> of a tribunal or influence the course of justice by <i>offering false evidence</i>, misstating facts or law, presenting or relying upon a <i>false or deceptive affidavit</i>, suppressing what ought to be disclosed or otherwise assisting in any fraud, crime or illegal conduct;</p> <p>(f) <i>knowingly misstate</i> the contents of a document, the testimony of a witness, the substance of an argument or the provisions of a statute or like authority;</p> <p>(g) make suggestions to a witness recklessly or that <i>he or she knows to be false</i>. The cross-examiner may pursue any hypothesis that is honestly advanced on the strength of reasonable inference, experience or intuition;... (emphasis added)</p>
Chapter 14, Rule 3 (Advertising, Solicitation...)	Advertising must <i>not mislead the uninformed or arouse unattainable hopes and expectations</i> , and must not adversely affect the quality of legal services, or be so undignified or otherwise offensive as to be prejudicial to the interests of the public or the legal profession (emphasis added)
Chapter 14, Rule 7 (Advertising, Solicitation...)	<p>Lawyers may offer professional services to prospective clients by any means except means:</p> <p>(a) that are <i>false or misleading</i>;</p> <p>(b) that amount to coercion, duress, or harassment;... (emphasis added)</p>

Table 4.2 identified some key provisions of the CBA Code. A review of these ethics rules using the literal approach shows that, like the United States and Australia, the *Code of Professional Conduct* in Canada imposes certain affirmative duties on the part of the lawyer towards various stakeholders in the legal system.

First, consistent with the Australian Bar Association *Model Rules (Barristers' Rules)* yet unlike the American Bar Association *Model Rules of Professional Conduct*, the Canadian Bar Association's *Code of Professional Conduct* makes no exceptions for any deceptive or misleading conduct in the context of negotiations.<sup>683</sup> In addition, the CBA Code does not distinguish between 'material' facts and non-material facts. On its face, it appears that all or *any* facts may fall within the scope of conduct deemed unethical if such conduct is deceptive, even where such conduct occurred within the context of a negotiation. Taking this into account, it appears that the CBA Code is more closely tied to duty ethics (via professional standards) than to end-result, community, or pragmatism ethics. By this I mean that the CBA Code favours a greater adherence to the professional codes of conduct that promote the lawyers' zealous representation of the client, duty of candour and respect for the courts, duty to preserve the quality of legal services and to protect the interests of the public<sup>684</sup> and the legal profession.<sup>685</sup> As such, it might be fair to say that community standards,<sup>686</sup> such as the generally acceptable conventions in negotiation that allow for some deceptive conduct, are not explicitly condoned, at least on the face of the CBA Code.

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<sup>683</sup> See, eg, *Canadian Bar Association Code of Professional Conduct* (2006), above n 679, 27-28, Chapter V, Rule 8 relating to conflicting interests in a contentious issue (stating in part that "if the issue is one that involves little or no legal advice, for example, a business rather than a legal question in a proposed business transaction, and the clients are sophisticated, they may be permitted to settle the issue by direct negotiation in which the lawyer does not participate."). This is the only reference to negotiation in the entire CBA Code and seems to preclude the lawyer participating in such a session so as to preserve the lawyer's impartiality and retain the respect of the public.

<sup>684</sup> *Canadian Bar Association Code of Professional Conduct* (2006), above n 679, Preface (stating that "[i]n order to satisfy this need for legal services adequately, lawyers and the quality of service they provide must command the confidence and respect of the public.")

<sup>685</sup> *Canadian Bar Association Code of Professional Conduct* (2006), above n 679, xiv (defining 'legal profession' as "lawyers collectively".)

<sup>686</sup> See Chapter 2, Section 2.3.5 (Theories of Ethics) for more information on the various ethics models. In the context of this thesis, 'community standards' refers to those standards of conduct established within a community or group outside of a professional body, such as lawyers or doctors, which imposes its own special set of ethics rules.

Within Canada, each province has its own legal professional body that regulates the lawyers within that particular jurisdiction. Unlike the CBA Code discussed above, the Law Society of Alberta, Canada is noteworthy because of its approach to regulating the negotiation behaviors of lawyers. The Law Society of Alberta's *Code of Professional Conduct*<sup>687</sup> (the Alberta Code) contains specific ethics rules for the lawyer as negotiator. The provisions that deal with regulating deceptive conduct in negotiations are highlighted in the table below along with an assessment of the affirmative duty which the lawyer owes to various stakeholders to refrain from such deceptive or misleading conduct.

**Table 4.3: Alberta, Canada: Sample Rules of The Law Society of Alberta *Code of Professional Conduct* (2006)<sup>688</sup> Regarding Deception and Misleading Conduct and Affirmative Duty to Stakeholders**

Rule	Description	Description of Affirmative Duty to Stakeholders
Chapter 11, Rule 1 (The Lawyer as Negotiator)	A lawyer must <i>not lie to or mislead</i> an opposing party. (emphasis added)	Duty to an opposing party
Chapter 11, Rule 2 (The Lawyer as Negotiator)	If a lawyer becomes aware during the course of a negotiation that:  (a) the lawyer has <i>inadvertently misled an opposing party</i> , or (b) the client, or someone allied with the client or the client's matter, has <i>misled an opposing party, intentionally or otherwise</i> , or (c) the lawyer or the client, or someone allied with the client or the client's matter, has <i>made a material</i>	Duty to an opposing party and opposing client; duty to an third party allied with the opposing party or client

<sup>687</sup> See generally *The Law Society of Alberta Code of Professional Conduct* (2006) <<http://www.lawsocietyalberta.com/resources/codeProfConduct.cfm>> at 9 August 2010.

<sup>688</sup> See generally *The Law Society of Alberta Code of Professional Conduct* (2006), above n 687. The Alberta Code specifically distinguishes between the lawyer's function as advisor, advocate, mediator, arbitrator, and negotiator. The Code has a specific chapter on the lawyer as negotiator, unlike the majority of other codes of professional conduct. Only the rules related to the lawyer as negotiator are highlighted here for comparison purposes. These rules appear to expressly prohibit forms of 'bluffing' that might be considered acceptable in other jurisdictions.

Rule	Description	Description of Affirmative Duty to Stakeholders
	<p><i>representation</i> to an opposing party that was accurate when made but <i>has since become inaccurate</i>,</p> <p>then, (subject to confidentiality - see Rule #7 of Chapter 7, <i>Confidentiality</i>) the lawyer must immediately correct the resulting misapprehension on the part of the opposing party. (emphasis added)</p>	
Chapter 11, Rule 4 ((The Lawyer as Negotiator)	A lawyer must not negotiate an agreement that the lawyer knows to be criminal, <i>fraudulent</i> or unconscionable. (emphasis added)	Duty to anyone with whom the lawyer negotiates an agreement

Table 4.3 highlighted several provisions of the Alberta Code related to the lawyer's function as negotiator. Several features of the Alberta Code deserve further discussion. First, in addition to identifying negotiation as a key distinct function of the lawyer, the Alberta Code specifically prohibits any deceptive or misleading conduct by a lawyer or his/her client towards the opposing party and the client's third-party allies, whoever they may be.<sup>689</sup> The Alberta Code does not appear to condone, at least on its face, any form of acceptable deception as argued by negotiation scholars or as tacitly accepted under the ABA Model Rules.

Second, the Alberta Code imposes a continuing affirmative duty on the lawyer to correct any deceptive or misleading conduct, including material misrepresentations which may have subsequently become inaccurate over the course of time in the negotiations. The Alberta Code does, however, retain the reference to 'material' facts with regards to this affirmative obligation to correct deceptive or misleading information.

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<sup>689</sup> Interestingly enough, the duty to be honest seems to be directed to the opposing party and client. There does not appear to be the same level of duty of honesty between the lawyer and his/her own client.

Finally, by specifically addressing negotiation as a function of a lawyer's job, as distinct from the lawyer's role as advisor, advocate, mediator, and arbitrator, the Alberta jurisdiction appears to acknowledge that while conventional negotiation practice may condone some deception in negotiation, the Alberta jurisdiction formally recognises this aspect of a lawyer's practice. In addition, by recognising the function of lawyer as negotiator, the Alberta jurisdiction appears to reject the view of adopting conventional negotiation practice in favour of imposing an affirmative obligation on lawyers in this jurisdiction to refrain from deceptive conduct in negotiation and encourages candour. In the Alberta jurisdiction, professional duty ethics appears to trump a community ethics or bargaining ethics model that might condone deception in negotiation.

A final jurisdiction which was the focus of this comparative analysis of legal ethics codes is Hong Kong. In Hong Kong, the *Code of Conduct of the Bar of the Hong Kong Special Administrative Region* (2008)<sup>690</sup> (the HK Code) and the *Hong Kong Solicitor's Guide to Professional Conduct* (2008)<sup>691</sup> (the HK Guide) govern the conduct of legal professionals. The HK Code applies only to barristers while the HK Guide applies to solicitors. The provisions that deal specifically with regulating the potentially deceptive conduct of legal professionals are highlighted in the table below, followed by a brief analysis.

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<sup>690</sup> See generally *Code of Conduct of the Bar of the Hong Kong Special Administrative Region* (2008) <<http://www.hkba.org/the-bar/code-of-conduct/code-of-conduct.html>> at 9 August 2010 (HK Code).

<sup>691</sup> The Law Society of Hong Kong, *Hong Kong Solicitors' Guide to Professional Conduct* (2008) <[http://www.hklawsoc.org.hk/pub\\_c/professionalguide/volume1/](http://www.hklawsoc.org.hk/pub_c/professionalguide/volume1/)> at 9 August 2010 (HK Guide)



**Table 4.4: Hong Kong: Sample Rules of the *Code of Conduct of the Bar of the Hong Kong Special Administrative Region* (2008)<sup>692</sup> and *The Hong Kong Solicitors' Guide to Professional Conduct* (2008)<sup>693</sup> Regarding Deception and Misleading Conduct**

Rule	Description
The HK Code, Rule 6	It is the duty of every barrister (a) to comply with the provisions of this Code and with the undertakings (if any) which he made on his call to the Bar; (b) not to engage in conduct (whether in pursuit of his profession or otherwise) which is <i>dishonest</i> or which may otherwise bring the profession of barrister into disrepute, or which is prejudicial to the administration of justice; (c) to observe the ethics and etiquette of his profession;... (emphasis added)
The HK Code, Rule 11	A barrister must report to the Bar Council if he is <i>convicted of a criminal offence which involves dishonesty</i> or which may bring the profession into disrepute. In case of doubt the offence should be reported. (emphasis added)
The HK Code, Rule 137	If at any time before judgment is delivered in a civil case, a barrister is informed by his lay client that he has <i>committed perjury or has otherwise been guilty of fraud upon the Court</i> , the barrister may not so inform the Court without his client's consent. He may not, however, take any further part in the case unless his client authorises him to inform the Court of the perjured statement or other fraudulent conduct and he has so informed the Court. (emphasis added)
The HK Guide, Rule 10.03 (Duty to Court)	A solicitor must <i>never knowingly attempt to deceive or participate in the deception</i> of a tribunal. (emphasis added)
The HK Guide, Rule 11.03 (Duty to Report Misconduct)	A solicitor is under a duty to report to the Council, where necessary after having obtained his client's consent, <i>any professional misconduct or dishonesty on the part of another solicitor or a member of his staff, or of any other person purporting to represent or to be in the employment of another solicitor or firm.</i>  Commentary 3 - A solicitor should inform the Law Society where <i>he is charged with an offence involving dishonesty or deception</i> or

<sup>692</sup> See generally *Code of Conduct of the Bar of the Hong Kong Special Administrative Region* (2008), above n 690. Note: The HK Code applies strictly to barristers and is based on "the Code of Conduct for the Bar of England and Wales (1981) addition with variations warranted by local conditions and practice."

<sup>693</sup> *Hong Kong Solicitors' Guide to Professional Conduct* (2008), above n 691. The Guide applies to solicitors.

Rule	Description
	any other serious criminal offence. (emphasis added)
The HK Guide, Intervention	A solicitor should inform the Law Society where he is charged with an offence involving dishonesty or deception or any other serious criminal offence.

Table 4.4 presented the key provisions of the HK Code and the HK Guide dealing with deceptive or misleading conduct. Several features of the HK Code and HK Guide are worth nothing in comparison to the legal ethics codes discussed above.

First, consistent with the other jurisdictions discussed above, Hong Kong also imposes certain affirmative duties on solicitors and barristers to refrain from engaging in potentially deceptive conduct.

Second, neither the HK Code nor the HK Guide makes explicit exception for deceptive or dishonest conduct in negotiations. The provisions in both codes of conduct in Hong Kong appear broad in application to solicitors and barristers.

Third, based on a literal reading of these rules, the most salient feature is strict compliance with the duties of the profession including its ethics and etiquette.<sup>694</sup> Duty ethics appears strong in the Hong Kong legal profession, even trumping community standards as evidenced by the HK Code's Rule 6(b) which regulates personal conduct and prohibits lawyers from engaging in personal conduct (conduct not in the course of carrying out one's profession as a barrister) that might be considered dishonest or impact the reputation of the profession or the administration of justice.

Finally, the duty to the profession and the court or tribunal seems higher than the duty to the client even where the barrister or solicitor may need informed consent to disclose certain information.

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<sup>694</sup> *Code of Conduct of the Bar of the Hong Kong Special Administrative Region* (2008), above n 690, Rule 6.

In summary, the foregoing section presented a comparative analysis of the legal ethics codes of a select group of common law jurisdictions in the United States, Canada, and Hong Kong. The next section focuses on the legal ethics codes of Australia.

### **4.3 AUSTRALIAN PERSPECTIVES: QUEENSLAND**

This section focuses on Australia, in general, and on Queensland, Australia in particular. Historically, the legal system in Australia was a self-regulated profession; however today, it is part of a co-regulatory system consisting of courts and independent statutory authorities, such as the use of the Legal Services Commission for handling lawyer disciplinary matters.<sup>695</sup> In addition, Australia's legal profession is 'a double-barrelled profession',<sup>696</sup> depending on the state or territory. In some states and territories, such as New South Wales and Victoria, the legal profession is separated into solicitors and barristers.<sup>697</sup> In other states and territories, such as Queensland, South Australia, and Australian Capital Territory, the legal profession is 'fused' and legal practitioners are considered 'legal professionals' (lawyers) though they may still practice as barristers and solicitors.<sup>698</sup> In those states and territories where solicitors and barristers have separate duties, the professional association for barristers is called the bar association while, for solicitors, the professional association is the law society.<sup>699</sup>

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<sup>695</sup> New South Wales Justice and Attorney General, *Lawyer Regulation in Australia: Background* (2009) <[http://www.lawlink.nsw.gov.au/lawlink/olsc/ll\\_olsc.nsf/pages/lra\\_index](http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/pages/lra_index)> at 9 August 2010.

<sup>696</sup> *Lawyer Regulation in Australia: Background*, above n 695.

<sup>697</sup> *Lawyer Regulation in Australia: Background*, above n 695 (barristers specialise in court work while solicitors specialises in general legal services)

<sup>698</sup> *Lawyer Regulation in Australia: Background*, above n 695 (providing a historical background to lawyer regulation in Australia and definition of key terms).

<sup>699</sup> *Lawyer Regulation in Australia: Background*, above n 695.

The Australian Bar Association provides model rules of conduct specifically for barristers. Until approximately 2004, the barrister discipline under Australian Bar Association was largely voluntary and barristers in Australia were not as heavily regulated as solicitors.<sup>700</sup> The Australian Bar Association *Model Rules (Barristers' Rules)* (the AusBar Model Rules) provides the professional code of ethics for barristers.<sup>701</sup> Table 4.5 represents some of the key rules as they pertain to regulating the potentially deceptive conduct of barristers. This is followed by a brief discussion and analysis of the AusBar Model Rules

**Table 4.5: Australia: Australian Bar Association *Model Rules (Barristers' Rules)* Regarding Deceptive and Misleading Conduct<sup>702</sup>**

Rule	Description
Preamble	These Rules are made in the belief: ...  2. As legal practitioners, barristers must maintain high standards of professional conduct.  3. The role of barristers as specialist advocates in the administration of justice requires them to act <i>honestly</i> , fairly, skilfully, diligently and fearlessly. ... (emphasis added)
Rule 21	A barrister must <i>not knowingly make a misleading statement</i> to a court on any matter. (emphasis added)
Rule 22	A barrister must take all necessary steps to <i>correct any misleading statement</i> made by the barrister to a court as soon as possible after the barrister becomes aware that the statement was misleading. (emphasis added)
Rule 29	A barrister will not have made a misleading statement to a court simply by <i>failing to disclose facts known to the barrister</i>

<sup>700</sup> See, eg, Levin, above n 587, 187-210; Haller, above n 587, 1; Linda Haller and Heather Green, 'Solicitors' Swan Song?: A Statistical Update on Lawyer Discipline in Queensland' (2007) 19.1 *Bond Law Review* 140. Each source provides a historical perspective on Australia's lawyer disciplinary system with a special focus on Queensland.

<sup>701</sup> The Australian Bar Association, *Creation of the ABA* (2006)

<[http://www.austbar.asn.au/index.php?option=com\\_content&task=view&id=21&Itemid=28](http://www.austbar.asn.au/index.php?option=com_content&task=view&id=21&Itemid=28)> at 9 August 2010 (discussing the history of the Australian Bar Association and its creation and purpose).

<sup>702</sup> See generally The Australian Bar Association, *The Australian Bar Association Model Rules* (2002) <<http://www.austbar.asn.au/images/stories/PDFs/CurrentABAModelRules2002.pdf>> at 9 August 2010. These model rules appear to pertain specifically to barristers and there is a special rule for barristers appearing as mediators, but not as negotiators. Negotiation is listed as a skill and task of the barrister.

Rule	Description
	concerning the client's character or past, when the barrister makes other statements concerning those matters to the court, and those <i>statements are not themselves misleading</i> . (emphasis added)
Rule 33	A barrister briefed to appear in criminal proceedings whose client confesses guilt to the barrister but maintains a plea of not guilty:  (a) may return the brief, if there is enough time for another legal practitioner to take over the case properly before the hearing, and the client does not insist on the barrister continuing to appear for the client; (b) in cases where the barrister keeps the brief for the client: (i) must not <i>falsely suggest</i> that some other person committed the offence charged;  (ii) must not set up an affirmative case inconsistent with the confession (emphasis added)
Rule 51	A barrister must not knowingly <i>make a false statement to the opponent</i> in relation to the case (including its compromise). (emphasis added)
Rule 52	A barrister must take all necessary steps to <i>correct any false statement unknowingly made by the barrister to the opponent</i> as soon as possible after the barrister becomes aware that the statement was false. (emphasis added)
Rule 53	A barrister will not have made a <i>false statement to the opponent simply by failing to correct an error</i> on any matter stated to the barrister by the opponent. (emphasis added)

Table 4.5 listed key provisions of the AusBar Model Rules pertaining to deceptive or misleading conduct. Four key points are worth noting about the AusBar Model Rules.

First, under the AusBar Model Rules, barristers are considered 'specialist advocates in the administration of justice'<sup>703</sup> and are required, among other things, to act honestly. Similar to the US ABA Model Rules, the AusBar Model Rules direct

<sup>703</sup> *The Australian Bar Association Model Rules* (2002), above n 702, Preamble.

barristers to refrain from engaging in any deceptive or misleading conduct and impose an affirmative duty to various stakeholders including the court and opponents.

Second, the AusBar Model Rules appear to place a greater emphasis on the duty to the court and the opponent in relation to the duty to the client. As such, the AusBar Model Rules seem to be more closely aligned to a loyalty to duty ethics than to community ethics or pragmatism as discussed in Chapter 2.

Third, the AusBar Model Rules, unlike some of the provisions discussed above, does not make the distinction between ‘material’ and non-material statements that might be deceptive or misleading. Under the AusBar Model Rules, the barrister has an affirmative duty to refrain from making ‘any’ false or misleading statements and to correct ‘any’ false or misleading statements known to have been made.

Finally, the AusBar Model Rules make no exception to any deceptive or misleading negotiation behaviour as being exempt from a violation of these rules. However, as noted before, the AusBar Model Rules are not mandatory and barristers, even today, may be able to bypass adherence to these rules simply by giving up their membership.<sup>704</sup>

Transitioning from Australia, in general, to one of the legal jurisdictions in Australia, this section now focuses on the legal ethics codes of Queensland, Australia. One of the focus areas of this thesis is Queensland, Australia in which the legal profession is ‘fused’ and barristers and solicitors<sup>705</sup> are regulated under a common

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<sup>704</sup> Levin, above n 587, 187-210; Haller, above n 587, 1.

<sup>705</sup> *Legal Profession Act 2007* (Qld), Schedule 2 (Dictionary) (defining ‘solicitor’ as “a local legal practitioner who holds a current local practicing certificate to practice as a solicitor” or “an interstate legal practitioner who holds a current interstate practicing certificate that does not restrict the practitioner to engaging in legal practice only as or in the manner of a barrister.”).

legislation. In Queensland, the *Legal Profession Act 2007* (Qld),<sup>706</sup> the *Legal Profession Regulation 2007* (Qld),<sup>707</sup> the *Legal Profession (Solicitors) Rule 2007* (Qld),<sup>708</sup> and the *Legal Profession (Barristers) Rule 2007* (Qld)<sup>709</sup> provide the ethics rules which govern the legal professionals in this jurisdiction. The rules which address the regulation of deceptive and misleading conduct for barristers and solicitors are highlighted in Table 4.6 and Table 4.7, respectively, based on each specific regulation.

**Table 4.6: Queensland, Australia: Sample Rules via the *Legal Profession Act 2007* (Qld) Regarding Deception and Misleading Conduct**

Rule	Description
s 328 (Setting aside costs agreements)	... (2) In deciding whether or not a costs agreement is fair or reasonable, and without limiting the matters to which the Supreme Court can have regard, the Supreme Court may have regard to any or all of the following matters— (a) whether the client was <i>induced to enter into the agreement by the fraud or misrepresentation</i> of the law practice or of any representative of the law practice;... (emphasis added)
Chapter 4, s 416 (Complaints and Discipline)	The main purposes of this chapter are as follows— (a) to provide for the discipline of the legal profession; (b) to promote and enforce the professional standards, competence and <i>honesty of the legal profession</i> ; (emphasis added)
s 420 (Conduct capable of constituting unsatisfactory professional conduct or professional misconduct)	The following conduct is capable of constituting unsatisfactory professional conduct or professional misconduct—  (c) conduct for which there is a conviction for— (i) a serious offence; or (ii) a tax offence; or (iii) an <i>offence involving dishonesty</i> ; <sup>710</sup> (emphasis added)

<sup>706</sup> *Legal Profession Act 2007* (Qld).

<sup>707</sup> *Legal Profession Regulation 2007* (Qld).

<sup>708</sup> *Legal Profession (Solicitors) Rule 2006* (Qld).

<sup>709</sup> *Legal Profession (Barristers) Rule 2007* (Qld).

<sup>710</sup> Under the *Legal Profession Act 2007* (Qld), dishonesty includes fraud.

**Table 4.7: Queensland, Australia: Sample Rules via the *Legal Profession (Solicitors) Rule 2007 (Qld)* Regarding Deception and Misleading Conduct**

Rule	Description
(Statement of general principle)	Solicitors, in all their dealings with the courts, whether those dealings involve the obtaining and presentation of evidence, the preparation and filing of documents, instructing an advocate or appearing as an advocate, <i>should act with competence, honesty and candour</i> . Solicitors should be <i>frank in their responses and disclosures to the court</i> , and diligent in their observance of undertakings which they give to the court or their opponents. (emphasis added)
Rule 1 (Duty to client)	A solicitor <i>must act honestly</i> and fairly, and with competence and diligence, in the service of a client. (emphasis added)
Rule 14 (Frankness in court)	14.1 A solicitor must <i>not knowingly make a misleading statement to a court</i> . 14.2 A solicitor must take all necessary steps to <i>correct any misleading statement</i> made by the solicitor to a court as soon as possible after the solicitor becomes aware that the statement was misleading. 14.3 A solicitor will not have made a misleading statement to a court simply by failing to correct an error in a statement made to the court by the opponent or any other person.... (emphasis added)
Rule 18 (Communications with opponent)	18.1 A solicitor must not knowingly <i>make a false statement to the opponent</i> in relation to the case (including its compromise). 18.2 A solicitor must take all necessary steps to <i>correct any false statement unknowingly made by the solicitor to the opponent</i> as soon as possible after the solicitor becomes aware that the statement was false. 18.3 A solicitor does not make a false statement to the opponent simply by failing to correct an error on any matter stated to the solicitor by the opponent.... (emphasis added)
Rule 28 (Communications)	A solicitor must not, in connection with the practice of law, in any communication with another person: 28.1 represent to that person that anything is true which the solicitor <i>knows, or reasonably believes, is untrue</i> ; or 28.2 make <i>any statement that is calculated to mislead or intimidate the other person</i> , and which grossly exceeds the legitimate assertion of the rights or entitlement of the solicitor's client; or ....(emphasis added)
Rule 30 (Standard of conduct)	30.1 <i>dishonest</i> ; 30.2 calculated, or likely to a material degree, to: (a) be prejudicial to the administration of justice; (b) diminish public confidence in the administration of justice; (c) adversely prejudice a solicitor's ability to practice according



Rule	Description
	to these rules. (emphasis added)
Rule 36 (Advertising)	A solicitor must <i>not advertise</i> the solicitor's expertise or practice if that advertising: 36.1 is <i>false</i> ; 36.2 is <i>misleading or deceptive, or likely to mislead or deceive</i> ; 36.3 is vulgar, sensational, or otherwise as would bring or be likely to bring a court, the solicitor, another solicitor or the legal profession into disrepute;... (emphasis added)

Table 4.6 listed key provisions of the *Legal Profession Act 2007* (Qld) while Table 4.7 listed provisions of the *Legal Profession (Solicitors) Rule 2007* (Qld) which address deceptive or misleading conduct. The *Legal Profession (Barristers) Rule 2007* (Qld) is similar to the AusBar Model Rules and is not repeated here. Several points are worth noting about the provisions of the Queensland jurisdiction's professional codes of conduct identified below.

First, while the Statement of general principles under the *Legal Profession Act 2007* (Qld) indicates that solicitors have a discretionary power (as indicated by 'should' statements) to be honest and frank in their responses and disclosures to the court,<sup>711</sup> the rules themselves explicitly contain affirmative obligations to refrain from engaging in deceptive or misleading conduct (as indicated by 'must' statements).

Second, solicitors are obligated to ensure that they do not bring the courts, other solicitors, or the profession into disrepute. In this aspect, the Queensland rules seem aligned with the duty ethics as well as pragmatism ethics models since both professional duty and concerns for reputation underlie the ethics rules.

Third, unlike Rule 4.1 of the ABA Model Rules, the Queensland legal profession rules do not make an explicit exception for any deceptive or misleading

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<sup>711</sup> *Legal Profession (Solicitors) Rule 2007* (Qld), 'Statement of General Principle'.

conduct that might occur in the context of a negotiation. Through a literal interpretation of these provisions, deceptive and misleading conduct appears to be strictly prohibited, even in negotiations.

Finally, whereas the ABA Model Rules make references to deceptive conduct in regards to ‘material’ statements of act or law, the Queensland rules do not appear to make this distinction. The use of the term ‘statements’<sup>712</sup> without a qualifier in some of the provisions seems to indicate that *any* statement made, material or otherwise, that is knowingly false or any statement that is not corrected within a reasonable time if *unknowingly* false may fall within the ambit of a possible ethics violation.

In summary, the Queensland ethics codes discussed above, at least on their face, appear more stringent than community standards with regards to deception in negotiation and aligned closely to an integration of duty ethics and pragmatism ethics to promote and ensure the high standards of the profession.<sup>713</sup> In the context of this thesis, the comparative analysis provides insight into determining whether the legal ethics codes are sufficient to deter deceptive or misleading conduct in negotiations and in developing the policy reform proposals outlined in Chapter 7.

#### **4.4 CROSS-JURISDICTIONAL SUMMARY ANALYSIS**

A synthesis of the cross-jurisdictional analysis of the legal ethics codes shows the following with regards to whether the jurisdiction addresses the negotiation process, deceptive conduct in negotiations, and whether the professional ethics code

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<sup>712</sup> See, eg, *Legal Profession (Solicitors) Rule 2007* (Qld), Rule 14 (Frankness in court) and Rule 18 (Communications with opponents)

<sup>713</sup> Cf Levin, above n 587 (citing to and discussing that even with these seemingly high standards, “there is something seriously wrong with lawyer discipline systems.”).

of conduct can be correlated to any of the five predominant ethics models discussed in detail in Chapter 2.<sup>714</sup>

**Table 4.8: Cross-Jurisdictional Summary Analysis of Deception in Negotiation in Legal Ethics Codes**

<b>Jurisdiction</b>	<b>Exception for Negotiation?</b>	<b>Map to Predominant Ethics Model</b>
US – ABA Code	Yes	<ul style="list-style-type: none"> <li>• Community ethics (e.g. negotiations community)</li> <li>• Duty ethics</li> <li>• Pragmatism</li> </ul>
Australia – AusBar Model Code	No	<ul style="list-style-type: none"> <li>• Duty ethics</li> </ul>
Queensland, Australia	No	<ul style="list-style-type: none"> <li>• Duty ethics</li> </ul>
Canada – CBA Code	No	<ul style="list-style-type: none"> <li>• Duty ethics</li> </ul>
Alberta, Canada	Yes	<ul style="list-style-type: none"> <li>• Duty ethics</li> <li>• Pragmatism</li> </ul>
Hong Kong	No	<ul style="list-style-type: none"> <li>• Duty ethics</li> </ul>

Professional ethics codes in the legal profession are the primary means to control the behaviour of lawyers in a variety of circumstances, including the use of potentially deceptive or misleading conduct by lawyers in negotiations. Nearly all professional codes of conduct contain provisions which prohibit deceptive conduct in a variety of circumstances including while in court or tribunal hearing, when dealing with another lawyer, when advertising for services, and if appointed to judicial office. Some codes of conduct are highly explicit regarding the circumstances in which deceptive conduct is prohibited whereas others use a guiding principle that is meant to apply to all aspects of legal practice, in all forums, and with all persons whether they are the general public, clients, opposing counsel, or the court.

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<sup>714</sup> See Chapter 2 (Review of Literature) for a more detailed discussion of theories of ethics, legal ethics, and bargaining ethics models.

For the purposes of this comparative analysis of legal ethics codes, the following common-law jurisdictions provided a relatively diverse sample from which to compare and contrast the legal ethics codes for the purpose of addressing the second research question: 1) Australia; 2) Canada; 3) Hong Kong; and 4) United States. I expected to see some differences between Australia and the United States, no differences between United States and Canada, and marginal differences between Australia and Hong Kong due to geographic proximity or lack thereof.

Three primary insights stand out after evaluating the legal ethics codes in these select common-law jurisdictions. First, law and ethics appear to collide within the professional ethics codes. They come from different perspectives and are not necessarily congruent or integrated in their assessment of which deceptive conduct is permissible or not. For example, lawyers are legally required to protect client confidences even where such confidences may lead the lawyer to ethically conclude that the client has engaged in wrong-doing. This may be consistent with the view of some scholars who argue that law is less strict than ethics and the legal ethics codes are rules of law, not ethics.<sup>715</sup> What this seems to mean is that even though the legal ethics codes place a broad prohibition on deception, lies and misleading conduct, these codes of conduct do not necessarily have as great a force for influencing behaviour as true societal ethics (general or community ethics) or even higher standards of personal ethics. In addition, the legal ethics codes do not appear to provide detailed clarity on specific conduct that is considered deceptive or misleading in the course of practice while still fulfilling professional obligations under the legal ethics codes. This may lead to the conclusion that that lawyers, in the course of their

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<sup>715</sup> Wetlaufer, above n 31, 1219.

duties, may use deception far more often than their personal ethics, or any ethics, might allow.<sup>716</sup>

The legal ethics codes stem from legal positivism and are essentially disciplinary codes. Thus, these rules are drafted and enforced by society and said to be ‘made by reason for the greater good.’<sup>717</sup> This is different from rules of natural law discussed in Chapter 2.<sup>718</sup> As discussed initially in Chapter 2, the legal ethics codes discussed in this thesis are primarily disciplinary codes.<sup>719</sup> In contrast, society’s ethical standards and, in some cases, personal ethics seem to be tied to principles of natural law - unchangeable, applying universally, and superior to man-made laws.<sup>720</sup> As such, these ethics codes are presumably aspirational codes and meant to convey a higher standard of conduct consistent with society’s or an individual’s expectations of truth and justice,<sup>721</sup> standards which can conflict with the legal profession’s duties as espoused in the legal ethics codes.

Second, the legal ethics codes studied in this thesis lack gradations between different kinds or degrees of wrong-doing and associated sanctions.<sup>722</sup> The effect of this, as seen by analysing the ethics violation cases in Chapter 5, is a seemingly subjective standard of assessment against a legal practitioner alleged to have engaged in deceptive conduct. Without explicit guidance on what is considered a violation of

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<sup>716</sup> See Chapter 2 (Review of Literature) for a more detailed discussion of theories of ethics, legal ethics, and bargaining ethics models.

<sup>717</sup> Carvan, above n 2, 4.

<sup>718</sup> See Chapter 2, Section 2.3.1 (Theories of Law) for more information on this topic.

<sup>719</sup> See Chapter 2, Section 2.3.3 (Theories of Legal Ethics) for more information on the difference between disciplinary codes and aspirational codes of ethics.

<sup>720</sup> See Carvan, above n 2, 4.

<sup>721</sup> This could stem from religious or spiritual beliefs about the nature of truth and justice and order in society.

<sup>722</sup> See, eg, *QLS Inc v Craig Stephen Bax* [1998] QCA 089 (Pincus JA) (discussing the fact that there are shades of dishonesty though not expanding on them. His view also did not affect the final outcome.). In the Queensland, Australia jurisdiction, these gradations are not specified in the legal ethics codes used to judge potential ethics violations.

the legal ethics code in terms of deceptive or misleading conduct in negotiations or other areas of practice, the lawyer is subject to the hardest sanctions for a potentially minor violation or degree of unethical conduct. Once again, it seems that a lack of gradations or degrees of prohibited deception is out of alignment with what the law allows and what society presumably condones in the case of negotiation behaviour.

One can imagine a scenario where a legal practitioner could be convicted of some form of deceptive conduct under an ethics code whereas law and the community standards might see this conduct as acceptable and not legally actionable. An example is a scenario where the lawyer's opening offer in a negotiation is untrue, unrealistic or unsubstantiated yet this tactic of a high opening offer is expected under prevailing negotiation principles. Under the explicit language of the legal ethics codes studied in this chapter, all the common-law jurisdictions, except the United States under the ABA Model Code, would presumably consider this deceptive or misleading conduct and therefore actionable as an ethics violation rather than this same conduct being considered mere 'puffing'. This is more likely in such jurisdictions as Australia, where there are no distinctions in the legal ethics codes with regards to negotiation behaviour.<sup>723</sup> In contrast, the American Bar Association's MRPC, Rule 4.1 specifically states that some negotiation practices such as 'puffing' are not 'material facts' subject to an actionable ethics violation. Condoning some forms of deception in a legal ethics code, regardless of how it might accurately reflect

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<sup>723</sup> Note: This is not to discount the potential impact of section 52 of the *Trade Practices Act* in Australia. It is, however, important to note many in the legal profession do not consider the *Trade Practices Act* to be binding to the profession in the strictest sense. Cf Australian Competition and Consumer Commission, *Professions and the Trade Practices Act* (2010) 19-20 <<http://www.accc.gov.au/content/item.phtml?itemld=926503&nodeId=71b6c165abc78f1a60f0a1643c9367&fn=Professions%20and%20the%20TPA.pdf>> at 9 August 2010 (specifically reinforcing the obligation of the professions to refrain from deceptive and misleading conduct when dealing with clients). This latter document is an updated document highlighting and reinforcing the application of the TPA on all professions in Australia, including the legal profession.

prevailing norms or prevailing law of that jurisdiction, has its problems. These problems can be addressed through minor, yet effective policy reforms as discussed further in Chapter 7.

Finally, the legal ethics codes take different approaches in how they view the role of negotiation. The distinction I am making here is the difference between seeing negotiation as a skill or a function (i.e. role). Negotiation is widely recognised as an important and required *skill* for the legal professional much like the ability to draft documents, conduct competent legal research, and make court appearances. At the same time, the legal professional, in many circumstances, serves formally in the *role* of negotiator on behalf of his/her client, a corporation, or a governmental body. This role of negotiator is distinct from, for example, the lawyer's role as a trial advocate (i.e. barrister), mediator, arbitrator, or judge. Each one of these roles (i.e. functions) requires the legal professional to adhere to certain defined codes of conduct, at least within the legal system. As evidenced by many legal ethics codes, there are specific ethics rules that apply to the lawyer as advocate, mediator or third-party neutral, prosecutor, or judge. However, in most of the legal ethics codes evaluated in this chapter, the function of 'lawyer as negotiator' is presumed yet not clearly distinguished from the lawyers' other roles.<sup>724</sup> In fact, with the increased use of alternate dispute resolution processes, a lawyer acts as a negotiator far more often than a litigator, advocate, or judge.<sup>725</sup>

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<sup>724</sup> Note: One exception, for example, is the *Law Society of Alberta's Code of Professional Conduct* discussed in Chapter 4, Section 4.2.

<sup>725</sup> This could be argued though in a less litigious society and on the international stage, it could be argued that the primary function of the lawyer is to negotiate on behalf his/her client's interests, with litigation being the final option. See, eg, Bordone, above n 96, 1 (discussing the need to formally recognise the distinction).

This issue of the distinction between a lawyer as negotiator and a lawyer who uses negotiation skills may be a fine and subtle distinction as well as controversial. On the one hand, explicitly recognising the role of a lawyer as negotiator means that the negotiation process as conducted by lawyers can be subject to specific ethical rules, such as those evidenced by the Alberta Code of Professional Conduct.<sup>726</sup> On the other hand, not recognising the role of lawyer as negotiator could mean that the negotiation behaviour of lawyers, if deceptive, will continue under the radar without scrutiny and that lawyers might rely on non-legal standards, such as prevailing negotiation practices, during negotiations and thus potentially violate the legal ethics codes. While the topic might be controversial, a discussion on this distinction may be warranted and useful in light of the negative perceptions facing lawyers today regarding their alleged deceptive conduct in negotiations, the potential impact of such conduct on the integrity of the bar, and the negative public perception of lawyers and the legal profession. Positive and frank dialogue about explicitly recognising the lawyer's role as negotiator along with constructive and objective assessment of amending the legal ethics codes to reflect this formal recognition may determine the extent to which legal ethics codes can successfully curtail the use of deception in negotiations.

#### **4.5 CHAPTER CONCLUSION**

In the legal profession, the professional codes of conduct of each jurisdiction are meant to provide guidance for how lawyers ought to behave as legal professionals. This includes whether lawyers can engage in potentially deceptive or misleading conduct in negotiations. This chapter analysed the extent to which the legal

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<sup>726</sup> See Chapter 4, Table 4.3 for more information.



profession's ethics codes address the issue of the use of deception in negotiation through a cross-jurisdictional analysis of the legal ethics codes of a select group of common-law countries.

The findings demonstrate a consistent approach to prohibiting deceptive or misleading conduct while showing a varied or non-existent approach to dealing with the lawyer as negotiator and his or her behaviour in this capacity. This chapter concluded with a discussion of some insights gained from this qualitative and comparative study of legal ethics codes. These insights pave the way for proposing a set of strategic policy reforms detailed in Chapter 7.

The next chapter, Chapter 5, focuses on a single common-law jurisdiction's handling of ethics violation cases alleging deceptive or misleading behaviour with an eye towards determining whether such behaviour in negotiations is or ever can be adequately and effectively regulated.

## **CHAPTER 5 – THE SUCCESS OF PROFESSIONAL ETHICS CODES IN CONTROLLING LAWYERS’ DECEPTIVE BEHAVIOUR**

*‘Truth is something which can't be told in a few words. Those who  
simplify the universe only reduce the expansion of its meaning.’*

*~ Anais Nin<sup>727</sup>*

Chapter 3 discussed the first research question while Chapter 4 focused on the second research question. This chapter focuses on the third research question, namely whether the professional ethics codes are successful in curtailing deceptive behaviour of lawyers in general and deceptive behaviour in negotiation, in particular. The chapter begins with an introduction to the Queensland legal jurisdiction and its attempts to curtail unprofessional conduct, unsatisfactory professional conduct, and professional misconduct in the form of misleading or deceptive behaviour. Next, the chapter presents the results of a qualitative study of Queensland’s ethics violation cases with a focus on cases involving deception in negotiation. This chapter concludes a brief summary of the results of this third research question and the implications of the findings on the law reform proposals discussed in Chapter 7.

### **5.1 INTRODUCTION (INCLUDING A DEFINITION OF SUCCESS)**

The third research question deals with whether the legal ethics codes can successfully control the lawyer’s deceptive behaviour in negotiation. In order to address this question, it is necessary to look at how a legal jurisdiction uses and enforces the legal ethics codes when there is a violation of this provision of the code

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<sup>727</sup> Brainyquote.com, *Anais Nin Quotes* (2009)

<<http://www.brainyquote.com/quotes/quotes/a/anaisnin391098.html> > at 9 August 2010. Anais Nin was an American author.

of conduct. In this thesis, I conducted an original study of the ethics violation cases in the common-law jurisdiction of Queensland, Australia. Queensland was selected as a sample jurisdiction for two main reasons.

First, Queensland's lawyer regulation framework provides that all ethics violation cases that are formally prosecuted be made available to the public through a public register. This allowed for easy access to the necessary research materials required to undertake the study. Second, Queensland's legal ethics code provisions were sufficiently distinct from those of, for example, the United States' ABA Model Code regarding deceptive and misleading conduct in negotiation, to serve as a point of useful comparison. These two factors combined with the researcher's geographic proximity to Queensland makes Queensland an ideal common-law jurisdiction on which to construct an analytical framework that can be leveraged in future studies on this topic.

As discussed in Chapter 4, Queensland's legal ethics codes prohibit all forms of deceptive and misleading conduct regardless of forum or function. In addition, Queensland's legal ethics codes are silent regarding negotiation behaviour and make no exceptions for deceptive conduct in negotiations.<sup>728</sup>

Prior to presenting the results of the empirical study of ethics violation cases, this section begins with a working definition of 'success' followed by a historical perspective of lawyer discipline in Queensland and an introduction about certain features of this jurisdiction. The purpose of these foundation sections is to provide a context for discussing the findings of the study of ethics violation cases in section 5.10.

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<sup>728</sup> See Chapter 4, Section 4.3 (Australian Perspectives – Queensland) for more information on select Queensland legal ethics code provisions relevant to this chapter.

One of the primary purposes of the legal ethics rules, as stated in section 3(a) of the *Legal Profession Act 2007* (Qld) is to regulate legal practice in Queensland so as to ‘protect[]...consumers of the services of the legal profession and the public generally.’<sup>729</sup> Protection of the public interest is such a priority that it ‘calls for effective vigilance over members of the profession and its standards of professional behaviour....to ensure as well as possible that the public may confidently place their business and affairs in its hands.’<sup>730</sup> Disciplinary proceedings are the means by which the legal profession attempts to protect the public as well as the reputation of the profession. While disciplinary proceedings are not meant to be a form of retribution, the Tribunal has acknowledged that ‘in order to protect the public and the reputation of the profession the consequences for the practitioner may need to be more severe than they would be if the only object of the proceedings was punishment.’<sup>731</sup>

Ideally, the punishment imposed would have a deterrent effect such that it would simultaneously protect the public and deter future misconduct.<sup>732</sup> Deterrence is distinguished from retribution in several ways. First, punishment as deterrence would prevent (deter) similar conduct in the future while punishment as retribution is simply punishment for its own sake.<sup>733</sup> Second, punishment intended to have a deterrent effect is ‘designed to have a future protective effect’ and is therefore forward-looking.

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<sup>729</sup> *Legal Profession Act 2007* (Qld) s 3(a).

<sup>730</sup> *Mellifont v The Queensland Law Society Incorporated* (1981) Qd. R. 17, 30 (Andrews J with the concurrence of Connolly J) (*Mellifont*).

<sup>731</sup> See e.g. *re Maraj* (1995) 15 WAR 12; *Queensland Law Society Incorporated v Smith* [2000] QCA 109; CA No 1052 of 2000, 4 April 2000 (describing the Bar as not an ordinary profession or occupation but one that requires that counsel “must command the personal confidence, not only of lay professional clients, but of other members of the Bar and of judges.”).

<sup>732</sup> *Attorney-General v Bax* [1999] 2 QdR 9 (Pincus JA noting that “Although I accept that remedies for suspension or striking off are not applied by way of punishment, but rather for the protection of the public, there is also a deterrent element.”) (*Bax*); *Queensland Law Society v Carberry* [2000] QCA 450, [38] (Moynihan SJA and Atkinson J saying in part “....As was pointed out in *Attorney-General v Bax*...there is a subsidiary purpose in the public interest and that is to deter other practitioners who might otherwise engage in professional misconduct.”).

<sup>733</sup> Haller, above n 587, 153-154.

In contrast, punishment intended as retribution ‘does not necessarily have a protective effect; it is merely thought “fair” that a person be punished’<sup>734</sup> for a wrong conduct committed in the past and therefore ‘has a backward focus’.<sup>735</sup>

In determining whether legal ethics codes are successful in regulating the deceptive behaviours of legal professionals in negotiations, ‘success’ as used in this thesis and for the purposes of this chapter, is defined as containing the following elements: 1) the legal ethics codes are successful in regulating deceptive behaviours of legal professionals in negotiations to the extent that the legal profession *formally prosecutes* lawyers who engage in deceptive conduct in negotiation; 2) the legal ethics codes are successful in regulating deceptive behaviours of legal professionals in negotiations to the extent that formal prosecutions of lawyers who engage in such conduct *deter others* from engaging in similar conduct in the future; 3) the legal ethics codes are successful in regulating deceptive behaviours of legal professionals in negotiations to the extent that there are *low recidivism rates* for lawyers who engage in such conduct in the future; and 4) the legal ethics codes are successful in regulating deceptive behaviours of legal professionals in negotiations to the extent that formal prosecutions of lawyers who engage in such conduct have enough of a deterrent effect on the future conduct of others such that the *public is protected and public perception of lawyers as deceptive or manipulative is diminished* or negligible.<sup>736</sup>

Keeping this definition in mind, the next section explores the historical perspective of lawyer discipline in the Queensland jurisdiction as well as the primary legal ethics violation types in Queensland. This is followed by the results and

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<sup>734</sup> Haller, above n 587, 154.

<sup>735</sup> Haller, above n 587, 153-154.

<sup>736</sup> Note: This definition of success is formulated from the proceeding discussion on the deterrent and punitive concepts in regulating behaviour.

analysis of an empirical study of Queensland ethics violation cases over an eleven-year period.

## **5.2 HISTORICAL PERSPECTIVE OF LAWYER DISCIPLINE IN QUEENSLAND**

Historically, and until the end of the 20<sup>th</sup> Century, the professional associations of solicitors and barristers have undertaken most of the responsibility of disciplining Australian lawyers.<sup>737</sup> Through the *Queensland Law Society Act 1927* (Qld),<sup>738</sup> which created the Queensland Law Society (Law Society or QLS) as an incorporated body, a ‘Statutory Committee’ was created with the power to hear complaints against solicitors and strike them off the roll where necessary.<sup>739</sup> Decisions of the Statutory Committee could be appealed to the courts that retained ultimate jurisdiction over solicitor discipline. During the 1920s and 1930s, the Queensland Law Society also monitored solicitors’ trust accounts and was granted the power to regulate issuance of practicing certificates.<sup>740</sup> While the Queensland Law Society had the power to formally discipline solicitors, the Queensland Bar Association, established in 1903 as a voluntary association of barristers, had no power to discipline barristers.<sup>741</sup> It was essentially considered a ‘toothless tiger’.<sup>742</sup>

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<sup>737</sup> D Weisbot, *Australian Lawyers* (1990), 193, 199-201. See also Levin, above n 587, 187-210.

<sup>738</sup> *Queensland Law Society Act 1927* (Qld) as amended by *Queensland Law Society Acts Amendment Act 1938* (Qld) and now called *Queensland Law Society Act 1952* (Qld) (establishing Queensland Law Society).

<sup>739</sup> Ibid.

<sup>740</sup> *Trust Accounts Act 1923* (Qld)

<sup>741</sup> Note: This is different from historical perspective of the Australian Bar Association discussed above in this chapter.

<sup>742</sup> Levin, above n 587, 189.

During the 1970s, doubts began to surface about the effectiveness of lawyer self-regulation<sup>743</sup> and the possible incorporation of a lay person or body and external ombudsman into the disciplinary process.

In 1985, Queensland enacted legislation which established a Lay Observer and created a Solicitors Disciplinary Tribunal (SDT).<sup>744</sup> Based on earlier recommendations, the Solicitors Disciplinary Tribunal was a panel composed of two solicitors and one lay person. The SDT could hear matters but could not strike off or suspend a solicitor.<sup>745</sup>

In 1997, both the Statutory Committee established under the *Queensland Law Society Act 1927* (Qld) and the Solicitors Disciplinary Tribunal established under the *Queensland Law Society Act Amendment Act 1985* (Qld) were replaced by a single Solicitors Complaints Tribunal (SCT).<sup>746</sup> Along with the SCT, a Legal Ombudsman was appointed with power to bring charges and to handle appeals to decisions of the SCT.<sup>747</sup>

By early 2003, issues still remained with lawyer regulation and the discipline process in Queensland. In 2003, upon request of the Queensland Attorney-General and Minister of Justice, the Legal Ombudsman conducted an investigation of the general complaints handling process conducted by the Queensland Law Society and issued a report stating that there was a 'conflict of interest in maintaining a regulatory

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<sup>743</sup> See, eg, NSW Reform Commission, Discussion Paper No 2, *'Legal Profession: Complaints, Discipline and Professional Standards, Part 1'* (1979) 7

<<http://www.lawlink.nsw.gov.au/lrc.nsf/pages/dp2out>> at 9 August 2010.

<sup>744</sup> *Queensland Law Society Acts Amendment Act 1938* (Qld).

<sup>745</sup> Levin, above n 587, 189 (citing Haller, above n 587, 4).

<sup>746</sup> *Queensland Law Society Acts Amendment Act 1938* (Qld); *Queensland Law Society Act 1952* (Qld), s 6AI (1).

<sup>747</sup> *Ibid.*

role as well as maintaining their [sic] role as a Society to benefit the profession.’<sup>748</sup>

The Legal Ombudsman recommended an independent body to handle lawyer complaints.<sup>749</sup>

In 2003, Queensland’s Parliament passed the *Legal Profession Act 2003* (Qld) (the 2003 Act) which established the independent lawyer discipline system and agency. This was quickly followed by the enactment of the *Legal Profession Act 2004* (Qld) (the 2004 Act), which retained the independent lawyer discipline system and added provisions including those on multidisciplinary partnerships, the practice of foreign law, and details on what may constitute unsatisfactory professional conduct or professional misconduct.<sup>750</sup>

The reforms to the Queensland lawyer discipline system under the 2004 Act are considered quite significant in comparison to other jurisdictions. Under the 2004 Act, the Queensland lawyer discipline system incorporates three main structural changes: 1) establishes the Legal Services Commissioner to receive, evaluate, refer complaints for investigations, and prosecute the case;<sup>751</sup> 2) establishes various procedures for how to handle certain categories of complaints;<sup>752</sup> and 3) establishes two separate tribunals to hear disciplinary matters.<sup>753</sup> In addition to the structural changes, the 2004 Act also represents a significant shift from a self-regulated

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<sup>748</sup> Jack Nimmo, *The Queensland Law Society and Baker Johnson Lawyers* (Legal Ombudsman, Brisbane, 2003), 2, 5, 7-9. See also *Baker v Legal Services Commission* [2006] QCA 145 (*Baker*).

<sup>749</sup> Nimmo, above n 748, 2, 5, 7-9.

<sup>750</sup> *Legal Profession Act 2004* (Qld) (the “2004 Act”). For the purposes of this thesis, I will refer to the *Legal Profession Act 2004* (Qld) where necessary as a historical reference point and to the most current reprint, the *Legal Profession Act 2007* (Qld), in general as it contains all the relevant provisions of the 2004 Act.

<sup>751</sup> *Legal Profession Act 2004* (Qld) s 414; *Legal Profession Act 2007* (Qld) ss 582, 583

<sup>752</sup> *Legal Profession Act 2004* (Qld) s 245, s 244, s 262; *Legal Profession Act 2007* (Qld) s 440 (consumer dispute), s 418 (unsatisfactory professional conduct), s 419 (professional misconduct).

<sup>753</sup> *Legal Profession Act 2004* (Qld) s 429, s 437, s 292 (1); *Legal Profession Act 2007* (Qld), ss 619, 621 (establishing the Legal Practice Committee), s 598, 599 (establishing the Legal Practice Tribunal).



disciplinary system to one with a ‘decidedly consumer-oriented tilt’<sup>754</sup> where the standard for discipline is not simply what the community of lawyers think but rather ‘the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian [legal] practitioner.’<sup>755</sup> These and other relevant provisions of the *Legal Profession Act* that affect the regulation of a lawyer’s deceptive conduct are discussed further in the next section.

### 5.3 INTRODUCTION TO QUEENSLAND LEGAL ETHICS

As introduced above, the *Legal Profession Act 2007* (Qld) (the 2007 Act) governs the practice of law in Queensland. A precursor to the 2007 Act, the *Legal Profession Act 2004* (Qld) (the 2004 Act) was intended to cure the mischief of the profession having an ineffective and self-interested monopoly on regulating its members while disregarding the interests of the public.

Consistent with statutory interpretation guidelines under the *Acts Interpretation Act 1954* (Qld), the purpose of the 2007 Act is: 1) to ‘provide for the regulation of legal practice in this jurisdiction in the interests of the administration of justice and for the protection of consumers of the services of the legal profession and the public generally’; and 2) ‘to facilitate the regulation of legal practice on a national basis across State borders.’<sup>756</sup> The 2007 Act and the *Queensland Law Society Act 1952* (Qld) serve as the legal ethics norms of the legal profession in Queensland via the 2007 Act’s complaints and disciplinary system.

In addition to providing redress to consumers of legal services, the 2007 Act aims to ‘promote and enforce the professional standards, competence and honesty of

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<sup>754</sup> Levin, above n 587, 192.

<sup>755</sup> *Legal Profession Act 2004* (Qld) s 244; *Legal Profession Act 2007* (Qld), s 418.

<sup>756</sup> *Legal Profession Act 2007* (Qld), s 3 (Main Purpose).

the legal profession<sup>757</sup> by disciplining legal professionals who violate such professional standards. In addition, legal practitioners in Queensland are also subject to other regulations governing their conduct including the *Queensland Law Society Act 1952* (Qld), the *Queensland Legal Profession (Solicitors) Rule 2006* (Qld) and the *Queensland Legal Profession (Barristers) Rule 2004* (Qld), though the *Legal Profession Act 2004* and the *Queensland Law Society Act 1952* provide the foundation with regards to disciplinary action against lawyers for unethical conduct.

Under section 35 (2) (ii) of the *Legal Profession Act 2007* (Qld), a person is suitable for admission as a legal practitioner only if the court decides that s/he is ‘a fit and proper person to engage in legal practice.’<sup>758</sup> The ‘fit and proper’ standard includes suitability matters in relation to the person upon application for admission or other matters deemed relevant by the court.<sup>759</sup> The ‘fit and proper’ standard also relies on a legal practitioner reaching or maintaining ‘a reasonable standard of competence and diligence’.<sup>760</sup> A ‘substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence’<sup>761</sup> means that a legal practitioner could be subject to a complaint and subsequent disciplinary proceedings for unsatisfactory professional conduct or professional misconduct.

The Legal Services Commissioner (the LSC), appointed by the Governor in Council, is the person authorised under the 2007 Act<sup>762</sup> to receive complaints,

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<sup>757</sup> *Legal Profession Act 2007* (Qld), s 416; *Legal Profession Act 2004* (Qld), s 3.

<sup>758</sup> *Legal Profession Act 2007* (Qld), s 35 (2) (ii) (Suitability for admission); See also *Legal Profession Act 2004* (Qld), s 30(1).

<sup>759</sup> *Legal Profession Act 2007* (Qld), s 31 (2). ‘Suitability matters’ is further explained in s 9 of the 2007 Act and may include a person’s character.

<sup>760</sup> *Legal Profession Act 2007* (Qld), s 418.

<sup>761</sup> *Legal Profession Act 2007* (Qld), s 419.

<sup>762</sup> *Legal Profession Act 2007* (Qld), s 584.

investigate complaints, to summarily dismiss complaints,<sup>763</sup> refer them to the Law Society or Bar Association for investigation and recommendations, and to prosecute the matter.<sup>764</sup>

Lawyer complaints may fall under three primary categories: 1) unsatisfactory professional conduct; 2) professional misconduct; and 3) consumer disputes. For the purposes of the focus of this thesis, complaints pertaining to unsatisfactory professional conduct and professional misconduct are relevant and discussed further below. Consumer disputes<sup>765</sup> will not be addressed in this thesis.

In order to better understand the empirical study and analysis of the ethics violation cases in Queensland presented in Section 5.10, it is important to have a foundation for some key terms and principles of the legal ethics code in Queensland and the standards by which lawyers are held accountable and prosecuted if in violation of the legal ethics code in Queensland. The next few sections provide the foundation of what is defined as unprofessional conduct, unsatisfactory professional conduct, and professional misconduct.

#### **5.4 UNPROFESSIONAL CONDUCT GENERALLY**

Unprofessional conduct was defined in the *Queensland Law Society Act 1952* as ‘....(a) serious neglect or undue delay; or (b) charging of excessive fees or costs; or (c) failure to maintain reasonable standards of competence or diligence; or (d) conduct described, under another Act, as unprofessional conduct or practice.’<sup>766</sup> It did not limit the type of conduct or practice that may be regarded as unprofessional.

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<sup>763</sup> *Legal Profession Act 2007* (Qld), s 432; *Legal Profession Act 2004* (Qld), s 259.

<sup>764</sup> *Legal Profession Act 2007* (Qld), s 447; *Legal Profession Act 2004* (Qld), s 276.

<sup>765</sup> *Legal Profession Act 2007* (Qld), s 440 and s 441 (Consumer disputes are generally referred to a process of voluntary mediation and do not result in a hearing).

<sup>766</sup> *Queensland Law Society Act 1952*, s 3B.

The *Legal Profession Act 2004* (Qld) replaced the use of ‘unprofessional conduct’ with ‘unsatisfactory professional conduct’.

## 5.5 UNSATISFACTORY PROFESSIONAL CONDUCT

Chapter 4, Part 4.1, section 418 of the 2007 Act<sup>767</sup> deals with unsatisfactory professional conduct and effectively states:

### **418 Meaning of *unsatisfactory professional conduct***

*Unsatisfactory professional conduct* includes conduct of an Australian legal practitioner happening in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.

While no specific behaviours or conduct are noted here, this definition appears to be in line with the more consumer-oriented system envisioned by Parliament.

Whereas the prior common-law definition of the professional standard looked to conduct that was ‘observed or approved by members of the profession of good repute and competency’,<sup>768</sup> the current standard of behaviour appears to create a new, higher benchmark for the regulation of the legal profession in Queensland. The former standard could be called the professional standard while the latter is referred to as the public standard.

According to the Legal Services Commission (the Commission), the public standard is a higher standard of expected conduct because the legal professional’s conduct is now assessed not only against a professional standard of what a community of lawyers might think (duty ethics as expressed by the legal rules and codes of conduct) but also by a reference to a standard that ‘a member of the public’ is entitled

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<sup>767</sup> *Legal Profession Act 2004* (Qld), s 244. See also Linda Haller, ‘Imperfect Practice Under the Legal Profession Act 2004 (Qld)’ (2004) 23 *The University of Queensland Law Journal* 411, 417-419.

<sup>768</sup> See, eg, *Re R, a practitioner of the Supreme Court* [1927] SASR 58, 61. See also Haller, above n 767, 417-419.

to expect.<sup>769</sup> This public standard appears to be a community ethic expressed perhaps via social-contract principles whereby members of the public expect a certain level of competence, diligence, and ethics from their lawyers whom they hire for a service.

The public standard is also one that encompasses more than just unethical or improper conduct as deemed solely by a community of lawyers. The Commission believes it also includes conduct that consumers of legal services deem unethical or improper such as ‘honest mistakes, errors of judgment, and poor standards of client service.’<sup>770</sup> In creating this potentially new benchmark, it appears that legal practitioners are accountable for two potentially conflicting standards of conduct in an attempt to bring greater alignment between what lawyers expect of each other (legal ethics rules) and what society and consumers expect of lawyers they hire and the legal profession in general (an end-result or social contract ethic).

Complaints alleging unsatisfactory professional conduct are generally heard by the Legal Practice Committee (LPC).<sup>771</sup> The LPC is comprised of a chairperson, two solicitors, two barristers and two lay members.<sup>772</sup> Decisions of the LPC can be appealed to the Legal Practice Tribunal (LPT) or, alternatively, with leave, to the Court of Appeal.<sup>773</sup> The standard of proof for an allegation of fact is ‘on the balance of probabilities’,<sup>774</sup> the satisfaction of which ‘varies according to the consequences for

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<sup>769</sup> Legal Services Commission, *Prosecution Guidelines* (2006) 5; See also John Britton, *The Legal Services Commission – An Overview* (Speech delivered at various district law associations, September – November 2004) <<http://www.lsc.qld.gov.au/speeches/2004Overview.pdf>> at 9 August 2010 (stating that the phrase ‘a member of the public’ is new language and raises the standard of conduct for lawyers).

<sup>770</sup> Legal Services Commission, *Prosecution Guidelines*, above n 769, 5.

<sup>771</sup> Britton, above n 769.

<sup>772</sup> *Legal Profession Act 2007* (Qld), s 622; *Legal Profession Act 2004* (Qld), ss 282(1), 469(2) (which only had two lawyers and one lay person on the Legal Practice Committee).

<sup>773</sup> *Legal Profession Act 2004* (Qld), ss 293(1), 294(2).

<sup>774</sup> *Legal Profession Act 2007* (Qld), s 649(1). Note that this standard is intentionally lower than the criminal standard, though conduct is sometimes perceived to be criminal in respect of the penalties and sanctions imposed.

the relevant Australian legal practitioner or law practice employee, of finding an allegation to be true.<sup>775</sup> A legal practitioner could also be charge with professional misconduct either in lieu of or in addition to charges of unsatisfactory professional misconduct. Professional misconduct is discussed in the next section.

## **5.6 PROFESSIONAL MISCONDUCT**

Chapter 4, Part 4.2, section 419 of the *Legal Profession Act 2007* (Qld) describes professional misconduct and states:

### **419 Meaning of *professional misconduct***

(1) *Professional misconduct* includes—

(a) unsatisfactory professional conduct of an Australian legal practitioner, if the conduct involves a substantial or consistent failure to reach or keep a reasonable standard of competence and diligence; and

(b) conduct of an Australian legal practitioner, whether happening in connection with the practice of law or happening otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.

(2) For finding that an Australian legal practitioner is not a fit and proper person to engage in legal practice as mentioned in subsection (1), regard may be had to the suitability matters that would be considered if the practitioner were an applicant for admission to the legal profession under this Act or for the grant or renewal of a local practising certificate.

From the literal reading of this provision, professional misconduct appears to be a more serious allegation than unsatisfactory professional misconduct since the legal practitioner is alleged to have engaged in conduct that not only violates the legal ethics code ('that the practitioner is not a fit and proper person to engage in law

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<sup>775</sup> *Legal Profession Act 2007* (Qld), s 649(2).

practice’)<sup>776</sup> but also the public’s expectations of how lawyers ought to behave (‘conduct involves a substantial or consistent failure to reach or keep a reasonable standard of competence or diligence’).<sup>777</sup> In many ways, the public standard also incorporates the profession’s expectations of the conduct of a reasonably competent and diligent legal professional.

Complaints alleging professional misconduct are heard by the Legal Practice Tribunal whose jurisdiction is to hear and decide lawyer-discipline applications.<sup>778</sup> The Tribunal is composed of the Supreme Court judges and constituted by one of its members.<sup>779</sup> In addition, one member of the lay panel and one member of the practitioner panel sit with the Tribunal to hear and decide on lawyer-discipline applications.<sup>780</sup> Decisions of the Tribunal can be appealed to the Court of Appeal.<sup>781</sup> While the sections on unsatisfactory professional conduct and professional misconduct do not particularly discuss behaviours, the 2007 Act does provide some context on what is meant by conduct subject to disciplinary proceedings.

## **5.7 MEANING OF CONDUCT UNDER THE *LEGAL PROFESSION ACT***

The *Legal Profession Act 2007* (Qld) provides a non-exhaustive listing of the types of conduct which may be considered unsatisfactory professional conduct or professional misconduct. This list includes, but is not limited to, contravention of relevant law,<sup>782</sup> charging excessive fees,<sup>783</sup> insolvency under administration,<sup>784</sup> and

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<sup>776</sup> *Legal Profession Act 2007* (Qld), s 419(1)(b).

<sup>777</sup> *Legal Profession Act 2007* (Qld), s 419(1) (a).

<sup>778</sup> *Legal Profession Act 2007* (Qld), s 601; See also Britton, above n 769.

<sup>779</sup> *Legal Profession Act 2007* (Qld), s 599.

<sup>780</sup> *Legal Profession Act 2007* (Qld), s 607(3).

<sup>781</sup> *Legal Profession Act 2007* (Qld), s 468(1); *Legal Profession Act 2004* (Qld), s 292(1).

<sup>782</sup> *Legal Profession Act 2007* (Qld), s 420(a).

<sup>783</sup> *Legal Profession Act 2007* (Qld), s 420(b).

<sup>784</sup> *Legal Profession Act 2007* (Qld), s 420(d).

failing to comply with orders of a disciplinary body.<sup>785</sup> Of particular relevance to this thesis is section 420(c), which states that ‘conduct for which there is a conviction for – (i) a serious offence; or (ii) a tax offence; or (iii) an offence involving dishonesty’<sup>786</sup> may be considered a violation of the Queensland ethics code. Under section 11(1) of the 2007 Act, a conviction includes ‘a finding of guilt’<sup>787</sup> or ‘the acceptance of a guilty plea’<sup>788</sup> regardless of whether or not the conviction is recorded on sentence. In addition, dishonesty is broadly interpreted and includes fraud.<sup>789</sup> As such, it would seem that this includes deceptive or misleading conduct by the legal practitioner during negotiations.

If the Committee or Tribunal finds that charges of dishonest conduct are found to be true, the legal practitioner is found guilty of such conduct. That finding of guilt is considered a conviction for the purposes of section 420 of the 2007 Act and the legal professional will subsequently be found guilty of unsatisfactory professional conduct or professional misconduct. Two items are worth noting at this point with regards to conduct as it does appear to impact the way ethics violation cases are heard and decided in this jurisdiction.<sup>790</sup>

First, there is insufficient detailed information on the types or degrees of conduct which may be considered ‘dishonest’.<sup>791</sup> Apart from the legal definition of fraud, there is little guidance in the 2007 Act about what constitutes dishonesty or

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<sup>785</sup> *Legal Profession Act 2007* (Qld), s 420(f).

<sup>786</sup> *Legal Profession Act 2007* (Qld), s 420(c).

<sup>787</sup> *Legal Profession Act 2007* (Qld), s 11(1)(a).

<sup>788</sup> *Legal Profession Act 2007* (Qld), s 11(1)(b).

<sup>789</sup> *Legal Profession Act 2007* (Qld), Schedule 2 Dictionary (defining ‘dishonesty’ as “includes fraud”).

<sup>790</sup> See Chapter 5, Section 5.9 for more discussion on the results of an empirical study of the ethics violation cases in the Queensland jurisdiction.

<sup>791</sup> Note: For the purpose of this thesis, ‘dishonesty’ can be achieved through the use of deceptive or misleading conduct. As such, a person who acts in a way so as to deceive or mislead someone would be considered dishonest.



whether there are degrees or scales of dishonesty that are more egregious than others for the purposes of an ethics violation. On its face, dishonesty in any form or forum appears to be strictly prohibited. In the context of the use of deception in negotiation, one is left to presume that no amount or type of deception in negotiation is allowed under the Queensland legal ethics code. In addition, any deception that would otherwise be acceptable under, for example, general negotiation practices, is presumably considered an actionable offence of dishonesty in this jurisdiction.

Second, the lack of clearer distinctions between unsatisfactory professional conduct and professional misconduct needs to be remedied. This may include a more precise definition of what a member of the *public* is entitled to expect from a legal professional versus what a member *within* the legal profession is entitled to expect from their colleagues, even under the same guise of ‘reasonable competence and diligence’. To the extent that those expectations are not clear or are conflicting, the legal practitioner has little guidance but to be at the whim of the public on the one hand and the expectations of the profession on the other. The same could be said of the sometimes conflicting duties to the client, the profession, the courts, the efficient administration of justice, and the public’s perception of legal services.<sup>792</sup>

## **5.8 AGGRAVATING AND MITIGATING CIRCUMSTANCES**

Aggravating and mitigating circumstances affect the degree to which the legal professional is prosecuted and punished for an alleged ethics violation. The Commission has established two tests that must be satisfied post-investigation before

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<sup>792</sup> This topic is not the focus of this thesis and, as such, is not fully discussed. There are numerous books and articles on these tripartite and sometimes conflicting duties, which explore this topic further. The reader is encouraged to read these for further information.

it will make an application to a disciplinary body to formally prosecute an alleged violation of the ethics code.

First, there must be a reasonable likelihood that the practitioner will be found guilty of unsatisfactory professional conduct or professional misconduct by a disciplinary body based on the evidence (the reasonable likelihood test).<sup>793</sup> Second, there must be a greater public interest in pursuing a formal disciplinary action (the public interest test) rather than not formally prosecuting the legal professional.<sup>794</sup> The Commission must prove the allegations on the ‘balance of probabilities’.<sup>795</sup>

In assessing the evidence, the Commission has the discretion to look at the totality of circumstances, including aggravating or mitigating factors in making their determination.<sup>796</sup> Such factors include, but are not limited to, the seriousness of the conduct and the need to protect the public interest, the need to ‘send a message’ to deter other practitioners or employees from engaging in like conduct, whether the conduct involved dishonesty or taking advantage of vulnerable clients, whether there was a genuine mistake or misunderstanding, the cooperation of the respondent, the respondent’s health, age, or infirmity, whether there were any previous disciplinary actions, and special circumstances that require leniency.<sup>797</sup>

It is well established that ‘the object of disciplinary action against legal practitioners is not to exact retribution... [but] to protect the public and reputation of

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<sup>793</sup> Legal Services Commission, *Prosecution Guidelines*, above n 769, 5.

<sup>794</sup> *Ibid.*

<sup>795</sup> Legal Services Commission, *Prosecution Guidelines*, above n 769, 5.; *Legal Profession Act 2004*, s 479; See also *Briginshaw v Briginshaw* (1938) 60 CLR 336 and *NSW Bar Association v Livesey* [1982] 2 NSWLR 231 at 238.

<sup>796</sup> Legal Services Commission, *Prosecution Guidelines*, above n 769, 6

<sup>797</sup> Legal Services Commission, *Prosecution Guidelines*, above n 769, 6-8.

the profession.’<sup>798</sup> In addition, the Commission may take certain mitigating factors into account when considering formal prosecution of a lawyer in violation of the ethics code. However, the review of the Queensland ethics violation disciplinary cases discussed in Section 5.10 shows a different story, one where post-appeal punishments and penalties amount to what could be the moral equivalent of retribution rather than deterrence even as the Commission may impose a more lenient disciplinary ruling.

## 5.9 PENALTIES AND PUNISHMENTS

The primary punishments when a legal practitioner is found guilty of unsatisfactory professional conduct or professional misconduct are suspension or striking off and a variety of costs orders.<sup>799</sup>

As explained by Reynolds J in *McNamara*, an order for suspension ‘must be based upon a view that at the determination of the end of the period of suspension’<sup>800</sup> the practitioner will no longer be unfit to practice because, subject to any limitation imposed on the issue of a Practising Certificate, his name will then be on the roll of solicitors and he may resume his practice.’<sup>801</sup> Reynolds J goes on to indicate that the

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<sup>798</sup> Legal Services Commission, *Prosecution Guidelines*, above n 769, 7 (quoting *Legal Services Commissioner v Baker* [2005] QCA 482).

<sup>799</sup> See, eg, *The Law Society of NSW v McNamara* (NSW Court of Appeal, unreported 7 March 1980) (discussing the choices of strike-off and suspension) (*‘McNamara’*); *QLS v Maxwell James Mead* [1997] QCA 083 (citing *The Law Society of NSW v McNamara*) (*‘Maxwell James Mead’*); *Mellifont* [1981] QdR 17, 30-31 (discussing the parameters of imposing a suspension).

<sup>800</sup> This appears to be a subjective assessment that looks to the expected conduct of the practitioner in the future. For example, if the legal professional is suspended for six months, that period of suspension is based on the subjective view of the Tribunal that six months is adequate punishment and rehabilitation and that the lawyer will be re-instated and fit to practice after six months. This seems highly subjective and arbitrary.

<sup>801</sup> *McNamara* (NSW Court of Appeals, unreported 7 March 1980)

power of suspension can be a valuable punitive measure but ‘needs cautious application where fitness and the Court’s protective function is involved.’<sup>802</sup>

A strike-off means that the legal practitioner is no longer considered a fit and proper person to practice law and is removed from the official roll of practitioners.<sup>803</sup> The practitioner would have to make a new application for admission at a future date to be reconsidered for admission to practice law again. In the interim, the legal practitioner may not take any new instructions from clients and is, in effect, no longer considered a member of the profession. The legal practitioner loses his/her practicing certificate and may not hold themselves out to the public as being a lawyer until such time as he or she re-applies and is re-instated onto the roll of legal professionals<sup>804</sup>

There are many critical issues in imposing suspensions, strike-offs, and costs orders. One involves the length of time that a legal practitioner should be suspended or struck-off. A second issue is the additional imposition of an award of costs against the legal practitioner who has just been suspended or struck off. A final issue is the extent to which the legal ethics codes infringe upon the lawyer’s personal conduct outside of professional obligations and when the legal practitioner is not engaged in the practice of law, such as when he or she is suspended or struck-off.

As recent disciplinary actions in Queensland have shown, the Commission may be lenient and compassionate in taking mitigating circumstances into consideration; however the Queensland Law Society and Attorney General’s office as well as the courts, who operate on the basis of protecting the public interest as the

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<sup>802</sup> *McNamara* (NSW Court of Appeals, unreported 7 March 1980).

<sup>803</sup> See, eg, *Bax* [1999] 2 QdR 4, 20 (“Where a practitioner is found to be unfit to practice, striking off, rather than a period of suspension, is generally appropriate.”).

<sup>804</sup> It is noted that in Queensland, there is no longer a distinction between solicitors and barristers. One is now considered a ‘legal practitioner’. I use the terms ‘legal professional’ and ‘legal practitioner’ interchangeably.

overriding concern, appear to have taken an almost zero-tolerance attitude towards legal practitioners who conduct themselves unethically and deceptively.

The next three sections present the results of an empirical study of the ethics violation cases in Queensland over an eleven-year period. These sections discuss how the Queensland jurisdiction decides ethics violation cases where the allegations involve misleading or deceptive conduct, with a specific focus on any such cases where the conduct took place in the context of a negotiation.

#### **5.10 QUEENSLAND ETHICS VIOLATION CASES**

The purpose of this section is to present the results of an original study I undertook which consisted of an analysis of the ethics violation cases in the Queensland jurisdiction between 1995 and 2006. The study focused on cases that alleged deceptive or misleading conduct, regardless of forum, with special attention to cases where such alleged misconduct conduct happened in the course of a negotiation. This section begins with a brief discussion of some recent statistics of the Queensland Legal Services Commission (LSC) followed by the findings of the study of Queensland's ethics violation cases.

In 2007, John Briton, the current Legal Services Commissioner in Queensland,<sup>805</sup> presented an update on the work of the LSC since its inception in 2004 at the Barristers Association of Queensland Annual Conference. The update included statistics on complaints received, complaints processed, and the subsequent disciplinary proceedings. These statistics provide an important prelude to

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<sup>805</sup> Note: John Briton is not a lawyer. This was considered an important symbolic and significant appointment in light of the reforms that led to the enactment of the *Legal Profession Act 2004* (Qld). See also *Legal Profession Act 2004* (Qld), s 414 (stating that the Legal Services Commissioner can be a lay person or lawyer).

understanding the context of the subsequent analysis and discussion of ethics violation cases involving misleading and deceptive conduct.

Prior to the *Legal Profession Act 2004* (Qld), the Queensland Law Society (QLS) dealt with lawyer complaints under the old system whereby the profession disciplined members of its own profession. The QLS received 1,602 complaints in 2002-2003 and 1,621 complaints in 2003-2004.<sup>806</sup> At the inception of the LSC in July 2004, the Commission had a backlog of almost 1,000 unprocessed and unresolved complaints, some of which had been in the old disciplinary system under the QLS for two or more years.<sup>807</sup> Under the new system, the Commission received 1,450 complaints in 2004-2005 and 1,074 complaints in 2005-2006.<sup>808</sup> By March 2007, the Commission had worked through the backlog and finalized resolution of these complaints. In addition, the Commission continued to receive ‘post-Act’<sup>809</sup> complaints.

There are perhaps two primary reasons for the reduction in the number of complaints after the enactment of *Legal Profession Act 2004* (Qld). One reason cited is the potentially artificial high number of complaints because of the Baker Johnson law firm scandal in 2002 and 2003 which dominated state and national headlines.<sup>810</sup> A second reason is most likely the process used by the QLS and the Commission to

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<sup>806</sup> John Britton, *The Legal Services Commission: An Update* 6 (Paper presented at the Bar Association of Queensland Annual Conference, 16–18 March 2007).

<sup>807</sup> Britton, above n 806, 1. The old disciplinary system consisted of the Queensland Law Society’s enforcement of the legal ethics rules.

<sup>808</sup> Britton, above n 806, 6 (stating this is “a reduction of more than 130 new complaints a month to the fewer than 90.”).

<sup>809</sup> Note: The term ‘post-Act’ refers to the enactment of the *Legal Profession Act 2004* (Qld) which created the Legal Services Commission.

<sup>810</sup> Levin, above n 587, 190 (discussing a national Queensland case involving the misappropriation of funds from elderly clients); Nimmo, above n 748, 2, 5, 7-9; Legal Ombudsman, *The Queensland Law Society and Baker Johnson Lawyers* (2003), 2, 5, 7–8.

pre-empt formal written complaints<sup>811</sup> by dealing with consumer complaints informally in the first instance and formally if the matter could not be resolved to satisfaction through the informal process.<sup>812</sup>

To explain the process briefly, both the LSC and QLS receive initial calls. If it appears that the problem is minor (such as poor communication or misunderstandings), the LSC's Compliant Officers or the QLS's Client Relations Officers will attempt to resolve the matter informally and privately.<sup>813</sup> If the LSC feels, for example, that the legal practitioner has undertaken restorative steps to correct the issues and prevent similar issues from occurring in the future, the LSC will, at its discretion, dismiss the complaint 'in the public interest'.<sup>814</sup> Conversely, if the LSC is not satisfied that the legal practitioner has taken restorative steps, the Commission may initiate a formal written complaint and call for an 'own motion' investigation. An 'own motion' investigation means that the LSC can initiate a formal investigation into a matter or systemic issue without receiving a formal written complaint.<sup>815</sup>

Returning to the statistical background of the complaints handled by the Legal Services Commission, the Commission finalised 978 conduct matters<sup>816</sup> in 2005-2006.<sup>817</sup> Of the 978 conduct matters, 543 were related to solicitors, accounting for 9% of all solicitors in Queensland. These complaints involved 459 law firms with the

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<sup>811</sup> Britton, above n 806, 6.

<sup>812</sup> Note: The 2004 Act does not require an informal process and this was instituted by the Commission in 2004.

<sup>813</sup> Levin, above n 587, 193-194. Complaints which are resolved informally and privately are not recorded and thus there is insufficient statistics to review these complaints.

<sup>814</sup> Levin, above n 587, 194.

<sup>815</sup> Legal Services Commission, *ILP Investigations* (2009) <<http://www.lsc.qld.gov.au/260.htm>> at 9 August 2010 (discussing an 'own' motion' investigation).

<sup>816</sup> Note: 'Conduct matters' refers to complaints alleging unsatisfactory professional conduct or professional misconduct. These are different from 'consumer disputes' which may include disputes about fees and are not the subject of this study.

<sup>817</sup> Britton, above n 806, 6.

bulk of them being solo practitioner firms (258) or two-partner firms (76).<sup>818</sup> Of the 978 conduct matters finalised in 2005-2006, the primary complaints ranged involved alleged unethical conduct (4 in 10), poor service quality (1 in 5), costs/fees (1 in 6), and poor communication (1 in 10).<sup>819</sup> Approximately 7 in 10 of these complaints were dismissed after investigation on the basis that ‘there was no reasonable likelihood of a finding by a disciplinary body of unsatisfactory professional conduct or professional misconduct.’<sup>820</sup> In total, only about 8 in 100 of the 978 conduct matters (approximately 78 complaints) were the subject of formal disciplinary proceedings either in the Legal Practice Committee or the Legal Practice Tribunal.<sup>821</sup>

The LSC 2005-2006 statistics regarding barristers in Queensland are under-representative of the total number of barristers with a local practising certificate (773).<sup>822</sup> The 2005-2006 statistics for complaints against barristers are under-representative for three main reasons. First, there are fewer barristers relative to the number of solicitors with practising certificates.<sup>823</sup> Second, at the time these statistics were generated, the LSC database was not linked to the Queensland Bar Association database in order to provide a complete picture of barrister complaints.<sup>824</sup> Third, barristers, except for those who accept direct briefs, deal less directly with clients and potential complainants than solicitors, who work directly with consumers of legal

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<sup>818</sup> Britton, above n 806, 8.

<sup>819</sup> Britton, above n 806, 6-7.

<sup>820</sup> Britton, above n 806, 7. Note: This does not mean that there was not a valid complaint by the consumer of legal services.

<sup>821</sup> Britton, above n 806, 7.

<sup>822</sup> Britton, above n 806, 10 (stating also that the under-representation is not statistically significant because solicitors are more vulnerable to complaints because of the nature of their role in having more direct contact with consumers of legal services).

<sup>823</sup> Britton, above n 806, 9.

<sup>824</sup> Britton, above n 806, 9-10.



services most often and direct the barrister in court matters.<sup>825</sup> Nevertheless, the statistics are insightful in regards to a barrister's conduct and subsequent complaints.

For example, between 2005 and 2006, the Commission received 57 complaints about barristers. Of these, 25 were classified as conduct matters alleging either unsatisfactory professional conduct or professional misconduct. Of the complaints received by the Commission between July 2004 and December 2006, the majority of conduct matters were by the client or client's solicitor (49%) or opposing client (15%). In addition, 15% of the conduct matters about barristers received by the Commission between July 2004 and December 2006 alleged 'misleading conduct or dishonesty' and 23% alleged 'other unethical conduct'.<sup>826</sup>

After investigation of the conduct matters involving barristers over the July 2004 – December 2006 period, 67% were dismissed for lack of a reasonable likelihood of conviction by a disciplinary body.<sup>827</sup> A further 20% of the conduct matters were finalised as dismissed based on other factors such as there being no public interest served in prosecuting the conduct.<sup>828</sup> Currently, almost 15% of all conduct matters are dismissed on these grounds.

The foregoing section provided a statistical background on the extent to which legal practitioners are formally prosecuted for violating the Queensland legal ethics codes. The next section focuses on the results of the study of ethics violation cases alleging misleading or deceptive conduct.

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<sup>825</sup> Britton, above n 806, 9-10 (stating that barristers who accept direct briefs are over-represented' with regards to barrister complaints received by the LSC).

<sup>826</sup> Britton, above n 806, 11.

<sup>827</sup> Britton, above n 806, 6.

<sup>828</sup> Britton, above n 806, 6 (noting that these figures are higher than in New South Wales).

### **5.10.1 Ethics Violation Cases Alleging Misleading/Deceptive Conduct (1996 – 2006)**

In attempting to determine whether legal ethics codes are successful in regulating the deceptive behaviours of legal professionals in negotiation, I undertook a study of the Queensland ethics violation cases between 1996 and 2006. The study looked at three primary factors: 1) the total number of ethics violation cases per year where the allegation was misleading or deceptive conduct; 2) the context in which the alleged violation occurred (e.g., in court or during a negotiation); and 3) the impact of aggravating or mitigating circumstances on a finding of guilt or during the punishment phase. Each of these primary factors is discussed below.

First, the focus of the study was on cases where the alleged violation was misleading or deceptive conduct and cases that were formally prosecuted via formal disciplinary hearings. The period of eleven (11) years was selected because of the availability of case materials as well as because such a time period would be sufficient to show any major trends. The cases reviewed and analysed as part of this empirical study were derived from the Commission's public discipline register.<sup>829</sup> These cases are those which could not be resolved through the Law Society's or the Commission's informal pre-emptive complaints handling process.

Between 1996 and 2006, there were approximately twenty (20) formal disciplinary cases raised against barristers and solicitors involving some type of deceptive or misleading conduct resulting in the legal practitioner being found guilty of unsatisfactory professional conduct, professional misconduct, or both.<sup>830</sup> Table 5.1 and Chart 5.2 below provide both a breakdown of the number of cases per year and a

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<sup>829</sup> *Legal Profession Act 2004* (Qld), ss 296 and 474; *Legal Profession Act 2007* (Qld), s 472.

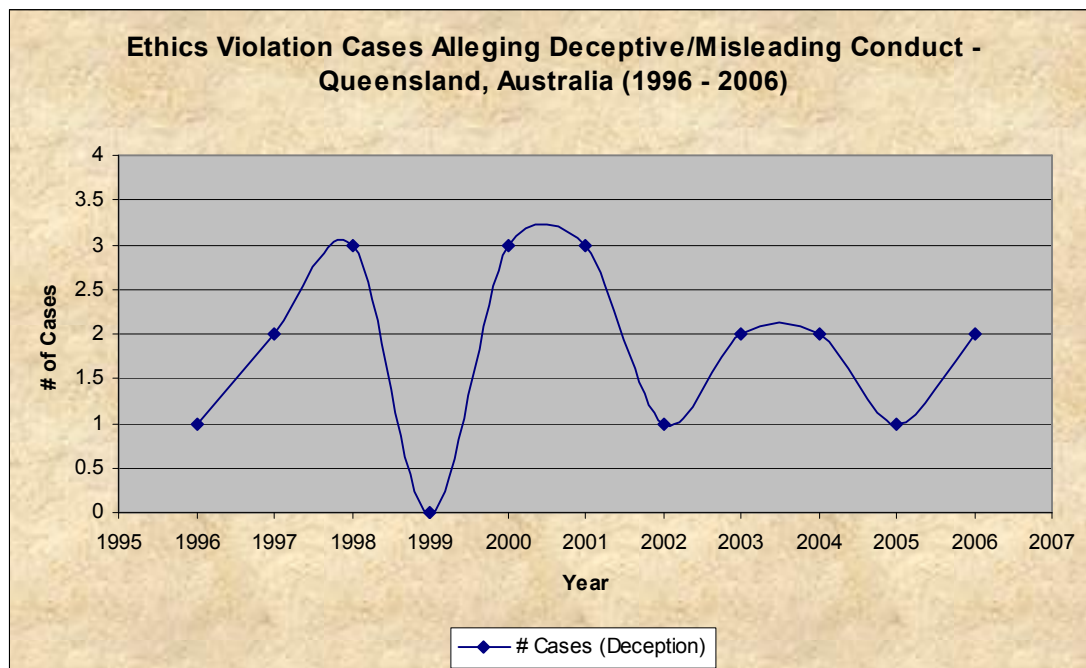
<sup>830</sup> See Chart 5.2 for a graphical representation of these cases over the years.

graphic representation of the total number of cases across the 1996 - 2006 periods, respectively.

**Table 5.1: Ethics Violation Cases Alleging Deceptive/Misleading Conduct - Queensland, Australia (1996 - 2006)**

Year	# Cases (Deception)
1996	1
1997	2
1998	3
1999	0
2000	3
2001	3
2002	1
2003	2
2004	2
2005	1
2006	2
<b>TOTALS</b>	<b>20</b>

**Chart 5.2: Ethics Violation Cases Alleging Deceptive/Misleading Conduct - Queensland, Australia (1996 - 2006)**



With regards to the deceptive or misleading conduct subject to discipline, approximately seven (7) of the cases involved misappropriation of client funds as a result of or in relation to a violation of duties under the *Trust Accounts Act*, four (4) cases involved submitting or presenting documents or affidavits that were false or with intent to mislead, one (1) case involved attempting to persuade a potential witness to perjure, four (4) cases involved failure to disclose information to a professional body or disclosing information to a professional body that was false or with intent to mislead, one (1) case involved fraudulent conduct in a personal capacity whilst relying on professional status, one (1) case involved excessive fines and dishonesty in charging fees, and one (1) case involved deceptive conduct in communicating with others and opposing counsel. A summary of the alleged deceptive or misleading conduct is included below in Table 5.3.

**Table 5.3: Ethics Violation Cases – Summary of Alleged Deceptive or Misleading Conduct (1996 - 2006)**

Number of Cases	Alleged Misconduct
7	Misappropriation of client funds
4	Document/affidavit false or with intent to mislead
4	Failure to disclose information as requested/misleading information disclosed
1	Induce witness to perjure
1	Furthering client's case by dishonest means
1	Fraudulent conduct in personal capacity
1	Excessive fees / dishonest charging of fees
1	Deceptive conduct with opposing counsel and third-party

Second, in addition to the general statistics on ethics violation cases alleging misleading or deceptive conduct, the study looked at the context in which the alleged violation occurred and the effect of any aggravating or mitigating circumstances on the final outcome of the case.

With regards to the context in which the offending conduct occurred, most involved daily practice. Of the twenty (20) cases that were the focus of this study, it appears that approximately sixteen (16) of the cases involved ethics violation cases where the conduct occurred during the course of daily practice. In addition, three (3) of the cases involved ethics violations where the alleged conduct occurred while in a formal hearing or in relation to a matter involving a professional body, such as an application for admission to the bar. Finally, one (1) case involved an ethics violation where the conduct alleged occurred during the course of handling a personal transaction (personal conduct) which allegedly adversely reflected upon the profession to such a degree that formal disciplinary action was warranted.<sup>831</sup>

In the context of this thesis and the issue of lying in negotiation, only one case was identified where the deceptive or misleading conduct occurred during negotiations. The *Mullins* case is discussed further in Section 5.10.2. The lack of formal prosecution of deception in negotiation appears to indicate that negotiation behaviour is not a prime focus of legal ethics violation cases.

With regards to the impact of aggravating and/or mitigating circumstances on the decision of the case, in nearly each of the cases reviewed, aggravating or mitigating circumstances were presented to support a finding of guilty or not guilty or to support the final sentencing. The common aggravating and mitigating circumstances cited and extracted from the cases in this study are listed in Table 5.4 below.

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<sup>831</sup> See Appendix 2 (Queensland Ethics Violations Cases (1996 - 2007) Summary Analysis) for further information.

**Table 5.4: Ethics Violation Cases – Common Aggravating and Mitigating Circumstances (1996 - 2006)<sup>832</sup>**

Aggravating Circumstances	Mitigating Circumstances
<ul style="list-style-type: none"> <li>• Failure to pay restitution for moneys lost;</li> <li>• Failure to show remorse for conduct;</li> <li>• Acknowledging wrong conduct on previous violation yet continuing to engage in wrong conduct; repeat offenders;</li> <li>• Not cooperating with Law Society investigations;</li> <li>• Prior findings and convictions of unprofessional conduct;</li> <li>• Persistent in wrong conduct over a period of time; not an isolated incident</li> </ul>	<ul style="list-style-type: none"> <li>• Restitution made for any monies lost by client;</li> <li>• Years of experience (sometimes this was considered an aggravating circumstance);</li> <li>• Showing remorse;</li> <li>• Pleading guilty, conveying remorse, apologising;</li> <li>• No active or intentional deception;</li> <li>• Conduct was not intended to create personal pecuniary advantage at the expense of client's disadvantage in monies</li> </ul>

In reviewing the impact of aggravating or mitigating circumstances on each case, it appears that, in particular, the range of mitigating circumstances varied yet seemed to have little or no effect on the final outcome. By this I mean that, generally, no single aggravating circumstance or perceived aggravating circumstance had greater weight than mitigating circumstances. In nearly all cases where the first level tribunal or committee hearing took into account mitigating circumstances,<sup>833</sup> the case was subsequently appealed to the Court of Appeal by the Attorney-General and Minister of Justice. On appeal, in nearly all of these cases, the order of the Tribunal was set aside and the legal practitioner was struck off the roll.<sup>834</sup> Aggravating or mitigating

<sup>832</sup> See also Appendix 3 (Queensland Ethics Violations Cases (1996 - 2007) Analysis for Aggravating/Mitigating Circumstances) for a detailed analysis of aggravating and mitigating circumstances per each case analysed in this empirical study.

<sup>833</sup> Note: As a result of taking into consideration the mitigating circumstances, the Tribunal or Committee generally decided to impose a heavy fine with costs or a suspended sentence with costs instead of heavier sanctions such as a strike-off. See Chapter 4, Section 4.9 (Penalties and Punishment) for more information.

<sup>834</sup> See Appendix 2 (Queensland Ethics Violations Cases (1996 - 2007) Summary Analysis) for further information.

circumstances were not necessarily weighed equally, objectively, or even on the balance of probabilities that the practitioner could reform his conduct through less severe punishments. The overriding reason provided for cases being overturned on appeal was the protection of the public interest, even to the significant detriment to the lawyer in terms of lost income, loss of a viable profession, loss of the only means to earn a living for which s/he was trained, and financial ruin in some cases.

It should also be noted that the fourteen (14) cases between 1996 and July 2004, when the Commission came into existence, were all prosecuted directly by the Law Society in conjunction with the Attorney-General and Minister for Justice, where there was no lay member representation on the panels deciding the case.

Interestingly, the six (6) cases formally prosecuted after the enactment of the 2004 Act seem to indicate a greater deference to the findings and orders of the Tribunal even after the case was appealed by the Attorney General or Minister for Justice. In addition, the cases prosecuted by the Commission seem to take into account the mitigating factors at least in equal measure with aggravating circumstances. Whether the fact that the current Commissioner is a non-lawyer and the current Legal Practice Tribunal has lay member representation has an impact on the findings and orders at first level hearings is difficult to establish. It could have very little impact as lay members have no legal background, have expressed being overwhelmed by the process at times and have felt daunted when participating in the post-2004 Act cases.<sup>835</sup>

On the other hand, the presence of lay members and those who actively participate in the hearings would likely bring to the hearings the ethical perspective of

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<sup>835</sup> See, eg, Levin, above n 587, 194-195 (discussing briefly some comments from lay members participating in the Legal Practice Committee and Legal Practice Tribunal for first level hearings.).

the community in which they live as well as the ethics standards of society in general. As Levin through his informal interviews with lay members of the Legal Practice Tribunal, lay members may have disagreed with the outcomes of the Tribunal hearing but ‘felt inhibited in terms of raising questions and talking during hearings.’<sup>836</sup>

In addition, even where lay members may have had strong opinions against a proposed resolution to the case, they would have to write a dissent from the majority view, something ‘they may feel ill-equipped to do.’<sup>837</sup> Finally, with regards to this thesis, of the twenty (20) cases that composed the focus of this empirical study, only one (1) case had a dissenting opinion and that opinion appears to be drafted by a legal practitioner, not a lay member of the panel.<sup>838</sup>

Finally, none of the pre-2004 Act cases alleging deceptive or misleading conduct were in the context of formal negotiations. However, during the post-2004 Act, when the Legal Services Commission took over the lawyer discipline system, it appears that the LSC took a much broader view of the context in which a lawyer may violate the ethics codes. Of significant importance to this thesis, the LSC did formally prosecute one case that involved potentially deceptive or misleading conduct in the context of a negotiation that was being conducted at mediation. The case involved a barrister who allegedly engaged in deceptive or misleading in a 2003 insurance claims negotiation that took place during mediation. This case will be discussed in more detail in the next section.

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<sup>836</sup> Ibid.

<sup>837</sup> Ibid.

<sup>838</sup> *Bax* [1998] QCA 089 (Pincus JA) (stating “It is not, in my opinion, every proved act of dishonesty on the part of the practitioner which justifies a substantial penalty; dishonesty, like other forms of misbehaviour, has grades of seriousness.”).



### 5.10.2 The *Mullins* Case – Deception in Negotiation

As previously discussed, during the period between 2005 and 2006, the Commission received 1,074 new complaints, of which 978 were classified as conduct matters.<sup>839</sup> Of the 978 conduct matters finalised in 2005-2006, approximately 8 in 10 (78 cases) were the subject of formal disciplinary proceedings.<sup>840</sup> The *Mullins* case<sup>841</sup> was the only case formally prosecuted in which the allegation was alleged deception in the context of a negotiation conducted during a formal mediation process. As such, the *Mullins* case represents less than 1% of all conduct matters finalised in 2005-2006 and less than 2% of all conduct matters subject to formal disciplinary proceedings. Of the twenty (20) cases over a period of 1996 to 2006 that were the subject of this empirical study where formal disciplinary proceedings were initiated and alleged deceptive or misleading conduct, *Mullins* appears to be the *only* case in which the violations occurred in the context of negotiations.<sup>842</sup>

Theoretically, if between 2002 and 2004, the Queensland Law Society received a total of 3,223 complaints and between 2004 and 2006, the LSC received 2,525 complaints with approximately 1,000 new complaints in 2007, then the *Mullins* case represents 1 in a total of approximately 6,747 complaints over a five-year period where deception in negotiation was formally prosecuted.<sup>843</sup> This does not even take into account the total number of complaints received between 1996 and 2002 which

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<sup>839</sup> Britton, above n 806, 6.

<sup>840</sup> Britton, above n 806, 7.

<sup>841</sup> *Legal Services Commissioner v Mullins* [2006] LPT 012 (*Mullins*).

<sup>842</sup> See Appendix 2 (Queensland Ethics Violations Cases (1996 - 2007) Summary Analysis) for more detailed information.

<sup>843</sup> Note: These estimates were calculated from statistics provided in the following publication: John Britton, *The Legal Services Commission: An Update* 6 (Paper presented at the Bar Association of Queensland Annual Conference, 16–18 March 2007). It should be noted that this is significant given that lawyers negotiate all the time in all facets of their profession and that negotiation is considered a critical and indispensable skill for successful and effective lawyers.

may have alleged similar misconduct and not been formally prosecuted or the total number of complaints alleging similar, yet less egregious conduct, which may have been informally and privately finalised by the Queensland Law Society or the Commission.

Statistically speaking, the *Mullins* case may be considered an important case because it appears to be an aberration as compared with other types of cases formally prosecuted by the LSC and represents the LSC's power of broad discretion to prosecute cases under the legal ethics rules which may have previously been considered 'off-limits' or non-actionable. For these reasons and others as explained by the Tribunal, *Mullins* is a watershed case in terms of legal ethics and a seminal case in terms of permissible or actionable deception during negotiations in the Queensland jurisdiction, a jurisdiction that, unlike the United States, makes no exceptions on the prohibition of all forms of dishonesty, whether in negotiations, mediations, or elsewhere. Having placed the *Mullins* case in context, the following is a detailed discussion of the case.<sup>844</sup>

Mullins is a prominent Queensland barrister (respondent) who, in 2003, was retained to represent a former builder (White-claimant) who had become a quadriplegic<sup>845</sup> as a result of a motor vehicle accident in 2001.<sup>846</sup> The case revolved around Mullins' conduct in connection with negotiations during a mediation setting for a claim for compensation for personal injuries against an insurer, Suncorp.<sup>847</sup>

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<sup>844</sup> Note: Because the case is publically available via the Commission's public discipline register, names as used in the Tribunal's decision are also used here for ease of reference and clarity of discussion.

<sup>845</sup> Quadriplegic is the inability to use all four limbs.

<sup>846</sup> *Mullins*, [2006] LPT 012, 2 [2]. See also Annabelle McDonald, "Patel case lawyer fined for deception", *The Australian* (Friday, November 24, 2006).

<sup>847</sup> *Mullins*, [2006] LPT 012, 2 [1], [2].

In April 2001, White (claimant-client) retained solicitors in order to pursue a claim for personal injury damages.<sup>848</sup> During the period between 2001 and 2003, the claimant's solicitors presented to Suncorp (insurer) various reports including medical reports and comprehensive assessments (Evidex reports) regarding the claimant's life expectancy, work-life expectancy, and future earning capacity.<sup>849</sup> By mid-Sept 2003, a mediation was arranged in an 'attempt to negotiate a compromise' of the claimant's personal injury claims.<sup>850</sup> Both the claimant and insurer retained barristers to represent their interests in the mediation. The claimant and his solicitors retained Mullins.<sup>851</sup>

On 16 September 2003, Mullins held a conference with the claimant and the claimant's solicitor to prepare for the mediation scheduled for 19 September 2003.<sup>852</sup> At this pre-mediation conference, the claimant disclosed that he had 'secondary cancer' which had been discovered on or about 1 September 2003 and for which he was undergoing chemotherapy treatments.<sup>853</sup>

Apparently, there were no medical reports or records about the facts related to the cancer.<sup>854</sup> Mullins advised the claimant and his solicitor that he thought the cancer facts should be disclosed to Suncorp prior to the mediation.<sup>855</sup> The claimant, however, instructed both his solicitor (Garrett) and barrister (Mullins) to not disclose the cancer

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<sup>848</sup> *Mullins*, [2006] LPT 012, 2 [2].

<sup>849</sup> *Mullins*, [2006] LPT 012, 2 [3] – [6].

<sup>850</sup> *Mullins*, [2006] LPT 012, 2 [7].

<sup>851</sup> *Ibid.*

<sup>852</sup> *Mullins*, [2006] LPT 012, 2 [8].

<sup>853</sup> *Mullins*, [2006] LPT 012, 2 [9].

<sup>854</sup> Note: There may have been reports but these reports were likely not generated as part of the 2001 Evidex reports pursuant to the 2001 accident. Whether they should have been included and the Evidex reports regenerated with updated information seems to be a key material issue.

<sup>855</sup> *Mullins*, [2006] LPT 012, 3 [10]. Given Mullins' experience, he would have known this would impact life expectancy and all future estimates for damages. This was also seen as a material issue in the Tribunal's opinion, that being the timing of when Mullins became aware of this fact.

facts to Suncorp ‘unless he was legally obligated to do so’<sup>856</sup> and to proceed with the mediation. Apparently both Garrett and Mullins felt that they were not legally obligated to reveal the cancer facts to the insurer (Suncorp) and Mullins subsequently presented Suncorp’s barrister (Kent) with a two-page document outlining the claimant’s schedule of damages and argument at mediation.<sup>857</sup> The Plaintiff’s Outline as prepared by Mullins repeatedly relied on and referred to the Evidex report as the basis of the proposed settlement figures contained in the Plaintiff’s Outline.<sup>858</sup> This was despite the fact that Mullins knew of the life expectancy assumption in the Evidex reports as based on medical reports in 2001 and also presumably knew that the life expectancy assumption would be different given the 2003 disclosure of the claimant’s cancer.<sup>859</sup> Between 16 September 2003 and 18 September 2003, Mullins spoke with Kent (Suncorp’s barrister) and, according to the “Statement of Agreed Facts”, again stated that the ‘claim for future economic loss was based on the [Evidex] report’ and did not seek to correct or disclaim<sup>860</sup> any assumptions contrary to the Evidex reports. Mullin’s representations were apparently accepted to the extent that Suncorp’s barrister and representatives of Suncorp concluded that consistent with the

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<sup>856</sup> *Mullins*, [2006] LPT 012, 3 [10]. See also *Motor Accident Insurance Act 1994* (Qld), s 45(3) (requires the claimant to disclose to the insurer “a significant change in the claimant’s medical condition, or in other circumstances, relevant to the extent of the claimant’s disabilities or financial loss” within 1 month of becoming aware of the change.). As the claimant was bound by the Act, the timing of disclosure would have significantly affected the claimant’s payout and was a material issue for the insurer, Suncorp.).

<sup>857</sup> *Mullins*, [2006] LPT 012, 3 [11] (called “Plaintiff’s Outline of Argument at Mediation” by the claimant and referred to here as the “Plaintiff’s Outline”).

<sup>858</sup> *Mullins*, [2006] LPT 012, 3 [11] – [13].

<sup>859</sup> *Mullins*, [2006] LPT 012, 3 [13].

<sup>860</sup> Cf *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592, 605 (Per Gleeson CJ, Hayne and Heydon JJ) (stating “In applying those principles, it is important that the agent’s conduct be viewed as a whole. It is not right to characterise the problem as one of analysing the effect of its “conduct” divorced from “disclaimers” about that “conduct” and divorced from other circumstances which might qualify its character. Everything relevant the agent did up to the time when the purchasers contracted to buy the Rednal land must be taken into account.”).

Evidex report, ‘the claimant had a life expectancy of 80% of that of a normal man of his age.’<sup>861</sup>

During the same period and by 18 September 2003, Mullins apparently spoke to senior counsel about his situation regarding disclosure of the cancer facts and also conducted some research.<sup>862</sup> He initially thought that the cancer facts should be disclosed.<sup>863</sup> However, after receiving advice from senior counsel, Mullins concluded that ‘as long as the claimant’s lawyers [Mullins] did not positively mislead Suncorp and its [Suncorp] lawyers about the claimant’s life expectancy, they would not be violating any professional ethical rules’ by not disclosing the cancer facts.<sup>864</sup> Mullins discussed this conclusion with White (claimant) and White’s solicitor and reiterated that White was not obligated to disclose the cancer facts, and that it was ‘not appropriate to make positive assertions during the mediation.’<sup>865</sup>

The mediation proceeded on 19 September 2003 as scheduled, with Suncorp continuing to rely on the Evidex reports and Mullins or the claimant’s solicitor making no corrections to the assumptions based on changed circumstances on the part of the claimant. The claim was settled at mediation<sup>866</sup> which, according to the Tribunal was not conducted subject to the *Uniform Civil Procedure Rules*.<sup>867</sup>

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<sup>861</sup> *Mullins*, [2006] LPT 012, 4 [14] - [16], 2 [4].

<sup>862</sup> *Mullins*, [2006] LPT 012, 5 [19].

<sup>863</sup> *Ibid.*

<sup>864</sup> *Ibid.*

<sup>865</sup> *Mullins*, [2006] LPT 012, 5 [20]. The ‘positive assertions’ seem to be any statements made without being asked that might have a negative impact on the claimant’s ability to get a maximum settlement from the insurer.

<sup>866</sup> *Mullins*, [2006] LPT 012, 5 [21] – [24]. See also McDonald, above n 846 (saying the claim was settled for over \$1 million).

<sup>867</sup> *Mullins*, [2006] LPT 012, 5 [15], n 7 (citing Rule 325 of the *Uniform Civil Procedure Rules 1999* (Qld), which requires that “the parties must act reasonably and genuinely in the mediation...”). This particular mediation appears to be one conducted outside of the ‘court-annexed’ mediation (i.e. a private mediation) as envisioned by the *Uniform Civil Procedure Rules 1999* (Qld).

In 2006, the Legal Services Commissioner pursued formal disciplinary action against barrister Mullins alleging that Mullins was ‘guilty of professional misconduct in connection with negotiations...that the respondent knowingly misled an insurer and its lawyers about this client’s life expectancy.’<sup>868</sup> The complaint alleged that the result of this misleading behaviour was that had Suncorp known about the cancer facts and potential change in life expectancy, they would not have agreed to the settlement at mediation.<sup>869</sup> Mullins was accused of fraudulent deception.<sup>870</sup>

During the Tribunal hearing, Mullins contended that because the negotiations were of a ‘commercial’ nature,<sup>871</sup> there was a ‘tacit, common assumption that...the parties would rely exclusively on their own resources and information’,<sup>872</sup> presumably meaning that there was no duty of disclosure. Furthermore, it seems Mullins argued that there was ‘no reasonable expectation that influential information communicated during the negotiations would not knowingly be false.’<sup>873</sup> In other words, Mullins appears to argue that because the negotiations were a commercial matter and outside of the court rules, legal ethics rules requiring honesty did not apply, there was not duty of disclosure as would apply in litigation, and the normal reasonable expectations were that negotiations would be conducted under generally accepted principles of negotiation, which allow for some permissible deception or lack of affirmative disclosure, such as lies by omission. In this case, Mullins was trying to get the best possible settlement for his client with duty to the client trumping a duty of candour to the court or the profession.

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<sup>868</sup> *Mullins*, [2006] LPT 012, 2 [1].

<sup>869</sup> *Mullins*, [2006] LPT 012, 5 [23].

<sup>870</sup> *Mullins*, [2006] LPT 012, 5 [23], 8 [31]. See also McDonald, above n 846.

<sup>871</sup> *Mullins*, [2006] LPT 012, 6 [25].

<sup>872</sup> *Ibid.*

<sup>873</sup> *Mullins*, [2006] LPT 012, 6 [25].

It appears the Tribunal was startled by these arguments<sup>874</sup> and equally resolute to set right the obligations of legal professionals in this context.<sup>875</sup> First, the Tribunal established that the commercial aspect of the negotiations did not preclude a duty to be honest during negotiations stating ‘that negotiations between a potential litigant and a tortfeasor’s insurer for a damages claim may be tinged with a commercial aspect serves rather to support the idea that the negotiations anticipate a measure of honesty from each other. After all, honesty promotes confidence in the process.’<sup>876</sup> The Tribunal quoted Lord Bingham of Cornhill in the *HIH Casualty* case as stating that ‘[p]arties entering into a commercial contract...will assume the honesty...of the other[s]; absent such assumption they would not deal.’<sup>877</sup>

Second, the Tribunal affirmed that just because lawyers participate in negotiations of such personal matters does not mean that ‘legal consequences will not attach to intentional deception about material facts.’<sup>878</sup>

Third, the Tribunal referred to the relevant rules of the Bar Association of Queensland’s Code of Professional Conduct,<sup>879</sup> namely Rules 51 and 52, which

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<sup>874</sup> *Mullins*, [2006] LPT 012, 6 [26] (the Tribunal states that the contentions are “at first blush startling” because they seem to say that neither law nor a more demanding ethical duty apply in this situation, something the Tribunal obviously considered void of merit).

<sup>875</sup> *Mullins*, [2006] LPT 012, 6 [27] (“Context influences the extent of legal and equitable obligations of disclosure.” (citing *Donne Place Pty Ltd v Conan Pty Ltd* [2005] QCA 481, [42]-[44]; *Magill v Magill* [2006] HCA 51, [48], [58], [156]).

<sup>876</sup> *Mullins*, [2006] LPT 012, 6 [27].

<sup>877</sup> *Mullins*, [2006] LPT 012, 6 [27] (citing *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6, [15]; [2003] 2 Lloyd’s Rep 61, 68).

<sup>878</sup> *Mullins*, [2006] LPT 012, 6 [28], note 15 (citing *Magill v Magill* [2006] HCA 51, [140] (stating “[t]he cases in which a court could conclude that the party making the representation, and the party to whom it was made, both intended at the time of the representation that legal consequences should attach to the veracity of what was said or written would be rare indeed. Unless both parties are shown to have intended that what was said or done should give rise to legally enforceable consequences, the action for deceit will not lie.”). *Magill* concerned a family law matters and the court distinguished representations in the context of marriage versus representations in the context of contracts. *Mullins* was about a contractual matter and therefore, actions could have legally enforceable consequences.

<sup>879</sup> See Chapter 4 for more information on the applicable legal ethics rules in Queensland.

impose a positive duty of honesty, and asserted that mediations are not ‘an honesty-free zone’<sup>880</sup> in which barristers can neglect or shed their ethical obligations.

Finally, the Tribunal found that Mullins had ‘intentionally deceived’ the opposing barrister, the insurer Suncorp and Suncorp’s representatives.<sup>881</sup> The Tribunal further found Mullins guilty of professional misconduct because the ‘fraudulent deception...involved such a substantial departure from the standard of conduct expected of legal practitioners of good repute and competency.’<sup>882</sup>

However, having found Mullins guilty of professional misconduct, the Tribunal fully acknowledged and gave weight to certain mitigating circumstances<sup>883</sup> and only imposed a penalty of a substantial fine and a public reprimand,<sup>884</sup> stating that ‘the protection of the public does not require more severe sanctions’<sup>885</sup> since the public reprimand and fine would be a sufficient deterrent to similar future behaviour. As Legal Services Commissioner John Briton stated post-hearing, the decision ‘...has provided a reminder to all members of the profession to act honestly and to be candid and accurate in the representation of their client’s cases whether in court, in mediations, or in everyday dealings.’<sup>886</sup>

The Tribunal’s decision in *Mullins* could be described as a double-edged sword. As discussed earlier, this case and the context of this case seem anomalous when compared to the thousands of complaints received and hundreds of formal disciplinary proceedings finalised over the last twenty years. While the decision in

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<sup>880</sup> *Mullins*, [2006] LPT 012, 7 [29]; See also *Legal Profession (Barristers) Rule 2004* (Qld), Rule 21 (requiring candour even in a matter that may be of adverse interest to the client) and Rule 14 (in which ‘court’ is defined to include a ‘mediation’).

<sup>881</sup> *Mullins*, [2006] LPT 012, 7 [30].

<sup>882</sup> *Mullins*, [2006] LPT 012, 8 [31].

<sup>883</sup> *Mullins*, [2006] LPT 012, 8 [33] – [34].

<sup>884</sup> *Mullins*, [2006] LPT 012, 9 [36].

<sup>885</sup> *Mullins*, [2006] LPT 012, 8 [35].

<sup>886</sup> McDonald, above n 846.



*Mullins* is important, there is a real likelihood that the decision will not have a significant impact on the future potentially deceptive behaviours of legal practitioners in similar circumstances. This is because the case represents only a single case in over 11 years that involves negotiation behaviour. In addition, the punishment imposed by Tribunal is not a deterrent to future such conduct.

On the one hand, the *Mullins* decision appears to have clarified and perhaps broadened the reach of legal ethics rules and positive duties of candour and truthfulness in Queensland beyond the comfort zones of most legal professionals. As the Tribunal stated, legal practitioners should not consider mediations or negotiation behaviour in mediation as exempt from duties of honesty and candour.

On the other hand, by imposing a penalty on the barrister that is: 1) like a slap on the wrist; and 2) substantially lenient as compared with prior decisions of the Tribunal or Court of Appeals, the Tribunal may have simply conducted a symbolic ‘public flogging’ of one lawyer while, at the same time, tacitly acknowledging and condoning such behaviour in the future. Certainly, if one is to believe the findings of Davis’ study of the negotiating attitudes and beliefs of personal injury lawyers in Queensland,<sup>887</sup> *Mullins*’ behaviour is normal, to be expected, and essential to the nature of personal injury claims negotiations in Queensland, where both plaintiff and defendant lawyers misrepresent and exaggerate offers in order to obtain some sense of justice for their client.<sup>888</sup> At the same time, *Mullins*’ reputation, to the extent that his clients and colleagues are aware of this ethics violation case and therefore concerned by such conduct, may be impacted by this matter.

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<sup>887</sup> Davis, above n 126.

<sup>888</sup> See Chapter 3 for a list of deceptive behaviours of personal injury lawyers based on Davis’ study.

In conclusion, the foregoing discussion of the *Mullins* case highlights a key finding of the empirical study of the Queensland ethics violation cases over the last ten years, namely that there is little to no formal prosecution of legal professionals who engage in allegedly deceptive conduct in negotiation.

There could be several reasons for the lack of little to no formal prosecution of such cases. First, as discussed previously, there may be a significant number of like cases which are not reported, cases which are reported and resolved or settled informally outside of the LSC dispute process, or cases which are reported and resolved informally within the LSC process so that formal prosecution does not serve the public interest.

Another possibility for lack of little or no formal prosecution of such cases is that deceptive behaviour in negotiation does not happen as frequently in this jurisdiction as in other jurisdictions; however, in the case of personal injury claims, this would be contrary to Davis' findings that strategic deception is a norm between plaintiffs and defendants in personal injury claims.<sup>889</sup> The *Mullins* case confirms the findings of Davis' study in this regard. The difference is that the LSC decided to formally prosecute Mullins in this instance and possibly decided not to formally prosecute other legal practitioners who handle similar personal injury claims either because such claims were informally settled or the matter was not deemed egregious enough to warrant formal prosecution in the interests of the public.

In cases where there is formal prosecution, the sanctions appear to be smaller and symbolic rather than large sanctions geared towards retribution, punishment, or rehabilitation of the legal professional in this regard.

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<sup>889</sup> See Chapter 2, Section 2.5.3 (Research About Legal Negotiation) for more information on Davis' study.

In summary, section 5.1 defined the success of legal ethics codes in preventing deception in negotiation, in part, by its ability to serve as a deterrent to prevent future such conduct through effective formal prosecutions and low recidivism rates which then protect the public and reduce the public perception of lawyers as deceptive or misleading.<sup>890</sup> In assessing whether legal ethics codes are successful in curtailing deception in negotiation, several points can be made.

First, the statistics of this unique study demonstrates a consistent pattern of ethics violations, sometimes increasing every year despite the presence of the same legal ethics code across those years. The fact that only 20 cases of misleading and deceptive behaviour over an eleven-year period are formally prosecuted seems to indicate that there is not a large focus on deterring or punishing such conduct, especially in negotiations.

Second, the *Mullins* case highlights the findings of the research on legal negotiation behaviour in personal injury cases as well as the effectiveness of ethics codes. The *Mullins* case seems to confirm Davis' findings that the use of deception in personal injury cases is considered normal and acceptable.<sup>891</sup> Furthermore, the *Mullins* case appears to reinforce Wilkinson et al's, Moliterno's, and Lamb's research that while lawyers do face ethical dilemmas, the legal ethics codes are not the primary source of guidance used by lawyers in deciding ethical dilemmas and, at times, do not provide sufficient guidance.<sup>892</sup> In the case of *Mullins*, for example, the barrister's

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<sup>890</sup> See Chapter 5, Section 5.1 (Introduction) for more information.

<sup>891</sup> See Chapter 3, Section 3.4 (Deception in Negotiation and Personal Injury) for more information on this topic.

<sup>892</sup> See Chapter 2, Section 2.5.4 (Research About Legal Ethics) for more information on this topic.

reliance on advice from senior counsel appears to have taken precedence over his own initial decision towards full disclosure, thus resulting in an ethics violation.<sup>893</sup>

Finally, the legal ethics codes of this jurisdiction and similar jurisdictions, at least on the basis of this study and confirmed by the research in Chapters 2 and 3, support that possible conclusion that legal ethics codes, without more, are not as successful as they can be in curtailing deception in negotiation. As such, more must be done to ensure that the legal ethics codes can effectively and successfully curtail deception in negotiation. This can be achieved through the implementation of a set of integrated policy reforms as discussed in Chapter 7.

## **5.11 CHAPTER CONCLUSION**

The main focus of this chapter was to present the results of an empirical study of the legal ethics violation cases in the state of Queensland, Australia. This common law jurisdiction was selected for a number of strategic reasons: 1) sufficient number of cases were available to support the study objectives; 2) the ethics violation cases for Queensland were readily available via a central public register; 3) the legal ethics code of Queensland is sufficiently different from the ABA MRPC so it served as a useful point of comparison between the actual rule and the perceived or actual behaviours in contravention of the ethics rules; and 4) the study provides an analytical framework which can be used in future, similar studies.

After introducing the key statutory and disciplinary framework within the Queensland jurisdiction as well as some recent statistical data on prosecutions of ethics violation cases, this chapter discussed the results of the study of ethics violation

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<sup>893</sup> See Chapter 5, Section 5.9.2 (The *Mullins* Case – Deception in Negotiation) for a full discussion of the *Mullins* case. See also *Mullins*, [2006] LPT 012.

cases. A notable conclusion from the study is that across a decade of prosecuting ethics violation cases involving deceptive or misleading conduct, only one case involved negotiation. A possible yet unlikely conclusion is that lawyer-negotiators in the Queensland jurisdiction are never deceptive or misleading and if they are, they are vehemently prosecuted in a manner that provides sufficient deterrence against future such conduct by other lawyers. A more likely and reasonable conclusion, however, is that this single case was a token case prosecuted only because of the notoriety of the offending lawyer. Furthermore, a lawyer's deceptive and misleading behaviour in negotiations is not prosecuted with the same fervour as other, perhaps more egregious, violations of the Queensland legal ethics codes.

The next chapter consolidates the findings of the three primary research questions introduced in Chapter 1 and subsequently discussed in Chapters 3, 4, and 5. The focus of the next chapter is to establish the implications of the foregoing research findings on the need for strategic, integrated policy reforms aimed at addressing this timely, yet unresolved issue within the legal profession.

## CHAPTER 6 – THE FOUNDATION FOR CHANGE

*‘Wholesale cultural change is essential if we are to give life to the promise of the law. [Legal culture has] failed to evolve sufficiently with the law. [The alternative is being to be part of] a revolution with the ordinary person in mind.’*

~ Victoria’s Attorney-General Rob Hulls<sup>894</sup>

The preceding three chapters presented and discussed the analyses of the three primary research questions established in Chapter 1, including the findings from an analysis of the potentially deceptive behaviours of lawyers during negotiations, the ways in which legal ethics codes attempt to regulate such behaviours and a qualitative analysis of the legal ethics violation cases in one common law jurisdiction. The purpose of this chapter is to summarise the critical findings and establish the case for change regarding the central issue of managing the use of potentially deceptive conduct by lawyers in negotiations.

### 6.1 INTRODUCTION

Victoria’s Attorney-General Rob Hulls’ quote above echoes the sentiments of Victoria’s Director of Public Prosecutions, Jeremy Rapke QC, regarding the fundamental problems of the state’s adversarial criminal justice system.<sup>895</sup> However, the sentiments apply equally across the entire legal system since the genesis of the profession’s current adversarial model for both civil and criminal matters stems from the criminal justice system model established since the seventeenth century.<sup>896</sup> Today,

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<sup>894</sup> Merritt, above n 560, 1.

<sup>895</sup> Merritt, above n 560, 2.

<sup>896</sup> Carrie Menkel-Meadow (2004) ‘Is the Adversary System Really Dead? Dilemmas of Legal Ethics as Legal Institutions and Roles Evolve’ in Jane Holder, Colm O’Cinneide and Michael Freeman (eds.) *Current Legal Problems* 85-115 (2004). Menkel-Meadow provides a historical view of the legal

whether in criminal or civil matters, the primary and most often-used skill by lawyers on a daily basis is negotiation.<sup>897</sup> Over the last 20 years, negotiation has played an even more important role in light of the ‘vanishing trial’ phenomenon,<sup>898</sup> the increased mandate for settlement negotiations, and the ever-expanding use of alternative dispute resolution processes such as mediation and arbitration.<sup>899</sup> As Chart stated, ‘negotiation is therefore an inevitable and major part of what lawyers do, in terms both of their significance of their negotiation efforts for clients, and the amount of time they devote to it’.<sup>900</sup> As such, how lawyers negotiate and the tactics and behaviours that form part of the lawyer’s negotiation repertoire transcend the individual lawyer and are a reflection of how the profession operates.<sup>901</sup> Most importantly, it creates an image and a perception in the eyes of the public of lawyers in particular and the legal profession in general.<sup>902</sup> How individual lawyers and the profession operate is important because, as Victorian Attorney-General Robert Hull stated, ultimately, the law and the legal system is ‘a taxpayer-funded system charged with solving people’s problems, with stopping and changing behaviour and, in doing

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process from the ‘trial by battle’ to ‘trial by court’ to the current evolution involving extensive use of alternative dispute resolution processes. See also Rhode, above n 151, 51-58 (discussing the evolution of the advocate’s role and the current and dominant role morality of lawyers).

<sup>897</sup> See, eg, Menkel-Meadow, above n 2; Williams, above n 202; Ross, above n 108; Rubin, above n 69; See also Lakhani, above n 268, 61, n. 6-9 (citing various sources to indicate the extensive use of negotiations in legal work causing over 955 of all cases filed for litigation to be settled before trial); Wetlaufer, above n 31, 1220.

<sup>898</sup> Marc Galanter, ‘Reading the Landscape of Disputes: What We Know and Don’t Know (And Think We Know) About Our Allegedly Contentious and Litigious Society’ (2003), 31 *University of California Los Angeles Law Review* 4, 64-65. (the term “settle” here means ‘terminate in an outcome agreed upon by the parties, sometimes formally ratified by the court, sometimes only noted as settled, and sometimes, from the court’s viewpoint, abandoned. The settlement process may begin even before the suit is filed. For example, a great majority of automobile injury claims are settled before filing.’).

<sup>899</sup> Jane R Chart, ‘Lawyers’ Work and Legal Education: Getting a Better Fit’ (2000) 19 *New Zealand Universities Law Review* 177, 178-179.

<sup>900</sup> Chart, above n 899, 178-179.

<sup>901</sup> Chart, above n 899, 178-179 (discussing how modern legal firms work in teams where they must manage both internal negotiations within their own teams as well as external negotiations with opposing parties on behalf of their clients.)

<sup>902</sup> See, eg, Wetlaufer, above n 31, 1220 (“The problem of lying in negotiations is central to the profession of law”).

so, with keeping the public safe.’<sup>903</sup> When lawyers feel the need to use potentially deceptive negotiation practices, they might compromise the system and its broader goals. Therefore, now more than ever, the issue of lawyers’ potentially deceptive conduct in negotiation requires urgent attention and resolution.

## **6.2 LAWYER DECEPTIVE BEHAVIOUR IN NEGOTIATIONS IS A REALITY**

Chapter 3 addressed the first research question of whether lawyers engage in deceptive behaviours during negotiation. Several important points are worth revisiting. First, current literature and research on legal negotiation as well as research on attorney behaviour in negotiations affirms that lawyers routinely use potentially deceptive behaviours in negotiation as well as in other areas of practice.

Second, lawyers appear to have various justifications for such conduct. These justifications include: 1) the legal ethics codes do not regard such conduct as unethical or prevent and punish such conduct; 2) the lawyer’s role-morality means that such conduct is permissible; 3) the behaviour was a defence posture as a result of the opposing lawyer’s deceptive behaviour; and 4) certain deceptive behaviour in negotiation is neither illegal nor unethical because of either community or conventional negotiation standards of behaviour.<sup>904</sup>

Third, literature on general negotiation appears to show that the use of such deceptive tactics is seen as acceptable, especially in the highly competitive, distributive bargaining, poker-player ethic of negotiation.<sup>905</sup>

Finally, lawyers and other parties of the legal system, including negotiation scholars, seem to believe that the use of potentially deceptive tactics in negotiation is

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<sup>903</sup> Merritt, above n 560, 3.

<sup>904</sup> White, above n 60, 927-928; Lerman, above n 60, 659; Wetlaufer, above n 31, 1219.

<sup>905</sup> See Chapter 2 (Review of Literature) for a detailed discussion on this topic.



condoned by the very nature of negotiations. Seen primarily as a private practice with little formal regulation or consistent rules regarding conduct,<sup>906</sup> the standard negotiation ‘dance’ invariably includes a certain amount of bluffing, puffing, and innocent misrepresentation which is not only allowed but expected. Of course, such conduct has ramifications for the legal negotiator and despite allowances for less than ethical conduct, one must ask whether the legal profession is content with the way things are or whether the profession can strive to define how lawyers ought to act during negotiations.

### **6.3 LEGAL ETHICS CODES ARE INSUFFICIENT TO CURTAIL DECEPTIVE NEGOTIATION BEHAVIOURS**

Chapter 4 looked at one of the primary ways that the conduct of legal practitioners is managed and regulated. Generally, the primary ways that the conduct of legal practitioners is regulated is through rules regarding expectations of professional and ethical conduct. Particularly in the common-law jurisdictions that are the focus of this thesis, these rules take the form of professional legal ethics codes which may be defined as predominantly disciplinary codes (as opposed to aspirational codes) centred around positive morality (as opposed to critical morality) and rooted in legal positivism.<sup>907</sup> These professional ethics codes are considered the standards which guide a legal practitioner’s behaviour and set the minimum moral principles for how lawyers ought to act in their role.<sup>908</sup> Chapter 4 presented an analysis of a comparative study of the legal ethics codes of a select group of common-law

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<sup>906</sup> Mize, above n 66,245 (describing negotiation a “voluntary process”, “lack the structure of a public courtroom”, and “casual and unstructured” which “saves money and allows greater flexibility in crafting the best settlement.”).

<sup>907</sup> See Chapter 2 (Review of Literature) a discussion on the distinctions between the various types of codes and morality.

<sup>908</sup> Loder, above n 42, 318; Condlin, above n 43, 317.

jurisdictions. This study, which represents an original contribution to the field, is a critical analysis of the ways in which the legal ethics codes, charged with regulating attorney behaviour, deal with the issue of potentially deceptive conduct in negotiation. The findings lead one to the conclusion that legal ethics codes, without more, appear to be insufficient in curtailing the deceptive behaviours of lawyers. These are discussed below. In addition, the findings reveal several opportunities for improvement in the form of policy reforms, which are discussed in detail in Chapter 7.

First, legal ethics codes appear to be adversarial in nature and tone. What I mean by this is *not* that they explicitly require lawyers to be adversarial in their dealings with the court, their colleagues or third parties; however, the language and wording of the rules invite conflict in an adversarial manner.<sup>909</sup> They do this in two primary ways. One way is that they present various duties owed to the court, the client, to opposing counsel and to third parties where such duties are either inconsistent or conflicting. For example, some rules explicitly state that the duty is owed to the court while other rules state the duty is owed only to the client.<sup>910</sup> Sometimes fulfilling a duty to the court might violate a higher duty to the client, such as attorney-client privilege. The problem with conflicting duties as stated in the rules is that there is little-to-no guidance on how to overcome this conflict and which duty might trump another equally valuable duty. While it is true that lawyers must constantly balance these various duties, the lack of explicit guidance in instances

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<sup>909</sup> See, eg, Bordone, above n 96, 4 (“...negotiation continues to piggyback on the ethical guidelines used for litigation, namely, the MRPC [in the United States]”).

<sup>910</sup> See, eg, *Model Rules of Professional Conduct (MRPC)* above n 293, Rule 4.1 (which prohibits false statements of material fact or law); Cf *Model Rules of Professional Conduct (MRPC)*, above n 293, Rule 4.1, comment (which states that the same lawyer “generally has no affirmative duty to inform an opposing party of relevant facts.”); See also *Legal Profession (Solicitors) Rule 2007* (Qld), Rule 14 (which indicates a duty to be frank the court) and Rule 15 (which appears to indicate a similar duty of honesty to opposing counsel). Neither imposes that same duty of honesty to the client.

where duties conflict or are inconsistent leaves room for potentially inconsistent and conflicting behaviours by legal practitioners. Coupled with a predominantly adversarial legal ethics model that stresses zealous representation of the client above all, it should not come as a surprise that perceptions of lawyers and the legal profession come under attack on a regular basis.<sup>911</sup>

A second way in which the legal ethics codes invite conflict is by not fully recognising changes happening within the provision of legal services and then adapting the ethics codes to reflect these changes. Some of these changes include the fact that modern law firms work primarily in teams (rather than purely as individuals) where internal and external negotiations are key,<sup>912</sup> globalisation of legal services,<sup>913</sup> greater democratisation of countries where greater efficiency in dispute resolution is required<sup>914</sup> and the arguable phenomenon of the ‘vanishing trial’.<sup>915</sup> The evolution in the distribution of legal services means that lawyers today perform a variety of functions (i.e. have a variety of roles) in the legal system, including but not limited to, their role as trial advocates (litigators or barristers). These roles also include acting as a negotiator (while not representing a client or representing a client), mediator, arbitrator, panel member, or judge. A key insight from the comparative study of legal ethics codes is that while the delivery of legal services has evolved, the legal ethics

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<sup>911</sup> See Section 6.5 (Studies of the Legal Profession Recommend Change) for a detailed discussion on this topic.

<sup>912</sup> Chart, above n 899, 178-179.

<sup>913</sup> See, eg, Terry, above n 548; Noone and Dickson, above n 666, 5.

<sup>914</sup> Alain Lempereur, ‘Negotiation and Mediation in France: The Challenge of Skill-Based Learning and Interdisciplinary Research in Legal Education’ (1998) 3 *Harvard Negotiation Law Review* 151, 152-153. While Lempereur specifically addresses the changes and needs in France and Europe, the changes he describes could easily apply to any country or legal jurisdiction with regards to changes in the need and provision of legal services.

<sup>915</sup> Galanter, above n 92, 462-463; Cf Macfarlane and Manwaring, above n 465, 253 (discussing this phenomenon in Ontario, Canada).

codes have not evolved sufficiently to keep pace with such changes, particularly where the lawyer's primary role is that of negotiator.

While some ethics codes, particularly in the United States, Australia, and Canada, have attempted to delineate between the various roles of a legal practitioner, there is a lack of consistency in the treatment of these roles across the common-law jurisdictions studied in this thesis. Where the function of a lawyer as negotiator is concerned, the legal ethics codes seem to take the position, by silence in most cases, that negotiation is a *skill* performed by the legal practitioner, not a unique *function* or *role* of the lawyer in a given situation.<sup>916</sup> One notable exception is the province of Alberta, Canada which specifically has a chapter, statement of principles and ethics rules for lawyers acting as negotiators.<sup>917</sup>

The impact of not formally recognising the unique function of lawyers as negotiators is that any unethical or misleading conduct that might occur in negotiations is not formally regulated and is considered permissible either under generally accepted conventions of negotiation practice or considered 'normal' under the guise of being a zealous advocate within the adversarial and competitive legal system.<sup>918</sup> In addition, lawyers may rely on other sources for guidance, sometimes resulting in a violation of the legal ethics codes.<sup>919</sup>

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<sup>916</sup> Note: The term 'skill' in this chapter means a task that someone *can do* where as the term 'function' in this chapter means a role that *someone plays or is*. For example, one can 'mediate' a dispute as an ordinary skill that is acquired in the course of daily events yet one can be a 'mediator' as a particular role with specialised skills at a given place and time. See, eg, Mize, above n 66, 247 ("...negotiation is a unique environment that must be treated differently from other forums."); Bordone, above n 96, 3; White, above n 60, 926 (recognising negotiation as a separate function though his article is most well-known for condoning lying in negotiations).

<sup>917</sup> *The Law Society of Alberta Code of Professional Conduct*, above n 687, Chapter 11 (The Lawyer as Negotiator). See Chapter 4, Section 4.2 (International Perspectives – United States, Canada, Hong Kong) for more information.

<sup>918</sup> White, above n 60, 926 (discussing how the non-public nature of negotiation contributes to the view that "ethical norms can probably be violated with greater confidence that there will be no discovery and punishment."). See also Mize, above n 66, 247 (specifically addressing the *Rules of Professional*

While this may not be cause for great concern for some, I argue it is of vital concern to the extent that the misleading or deceptive negotiation behaviour of a single lawyer might be perceived as representative of a majority of lawyers, the profession as a whole, or the legal system.<sup>920</sup> If the legal profession accepts the conventional standards of negotiation behaviour which advocate, condone, and expect some forms of deceptive and misleading conduct as ‘normal’, then the profession must also provide some explicit guidance on whether lawyers and members of the legal profession are to adhere to generally accepted negotiation practices or are subject to a higher standard of negotiation behaviour.<sup>921</sup> If the legal profession does not provide explicit guidance in this most important area, there is a greater chance that lawyers might be seen as nothing more than ‘hired hands’ and no longer part of a profession charged with serving the public through the administration of justice.<sup>922</sup>

In summary, the focus of the second research question, discussed in detail in Chapter 4, was on a comparative study of the legal ethics codes of a select group of

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*Conduct for Barristers and Solicitors* in New Zealand and stating that because the Rules “do not clearly spell out whether strategic posturing is permitted....’[t]hey can be read as requiring total honesty, or as limiting the duty to be honest to certain circumstances, with negotiations possibly being outside the “many occasions”....”). Mize’s assessment applies to each jurisdiction in this study with the exception of Alberta, Canada, which explicitly spells out the code of conduct for lawyers as negotiators.

<sup>919</sup> See, eg, Chester Louis Karras, *Give and Take: The Complete Guide to Negotiating Strategies and Tactics* (1974); Chester Louis Karras, *The Negotiating Game: How to Get What You Want* (1970). Karras is a renowned publisher of business negotiation books and explicitly advocates that bluffing and attempting to mislead the opponent is a regular part of negotiations. Harry C Triandis et al, ‘Culture and Deception in Business Negotiations: A Multilevel Analysis’ (2001) 1(1) *International Journal of Cross Cultural Management* 73, 74-75 (discussing the use of deception in negotiation from a business perspective across individualist and collectivist cultures); Williams, above n 202 (discussing how some legal negotiators continued to use adversarial tactics, including deception, because it worked to get them a better deal)..

<sup>920</sup> Note: This is my own contention; however the Honesty and Ethics consumer poll conducted yearly by the Gallup organisation appears to affirm the fact that consumers believe lawyers and the legal profession to be one of the least honest and ethical professions consistently across a ten-year period. This rating is far below the same rating given to the medical profession and even judges. This is discussed in more detail further in this chapter.

<sup>921</sup> See, eg, Mize, above n 66, 245 (discussing the nature of deception in negotiation by lawyers and arguing that lawyers should not be held to a higher standard than ordinary negotiators). But see Rubin, above n 69, 577; Thurman, above n 148, 103; Wetlaufer, above n 31, 1219.

<sup>922</sup> See, eg, Kronman, above n 547.

common-law jurisdictions, including Australia, United States, Canada, and Hong Kong. While the foregoing insights are aimed at the jurisdictions analysed, the implications of these issues are global in nature. As discussed further in Chapter 7, reforming the legal ethics codes toward greater consistency is one simple, yet effective way to achieve some harmony within the profession in a highly global, multicultural world of clients and legal jurisdictions.<sup>923</sup>

#### **6.4 LEGAL ETHICS CASES IN QUEENSLAND DEMONSTRATE INEFFECTIVE ENFORCEMENT OF DECEPTIVE NEGOTIATION BEHAVIOURS**

Chapter 5 illustrated the legal ethics code in action within a particular common-law jurisdiction when faced with the issue of lawyer deception in negotiation.

Legal ethics cases arise out of violations of the legal ethics codes. For example, if a particular rule within the legal ethics codes prohibits misleading or deceptive conduct, a lawyer may be subject to disciplinary proceedings for violating such a professional and ethical standard. In Chapter 5, I analysed the legal ethics cases in Queensland where the violation involved deceptive or misleading conduct.<sup>924</sup> In nearly each of the common-law jurisdictions, legal ethics cases are available to the public as a means of providing some disclosure to those purchasing legal services. In Queensland in particular, it is a step towards recognising that legal services should, in some respects, be subject to greater scrutiny in an effort to promote and provide ‘more flexible and efficient provision of legal services...’<sup>925</sup> as well as monitoring lawyer conduct for the protection of the public.

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<sup>923</sup> See Chapter 7 (Implications for Law Reform) for more information.

<sup>924</sup> The focus of the analysis was only cases alleging deceptive or misleading conduct with a focus on any such cases where the conduct occurred in the course of a negotiation. Therefore, the discussion and summary analysis in this section deals only with these specific cases.

<sup>925</sup> Trade Practices Commission, *Study of the professions: Summary of Final Report - Legal* (1994).

The findings from an analysis of the ethics violation cases of this jurisdiction indicate that there is ineffective enforcement of the ethics code with regards to deceptive negotiation behaviours by legal practitioners. In addition, even where there is formal enforcement of such conduct, prosecution is minor and not significant enough to serve as a deterrent to similar conduct in the future. The analysis of the legal ethics cases in Queensland, Australia shows several opportunities for improving the enforcement mechanism for more effective regulation, especially with regards to misleading or deceptive behaviour in negotiation. These opportunities and insights are discussed below while potential policy reform proposals are outlined in Chapter 7. The empirical study also provides a framework from which to conduct similar studies in other jurisdictions to ascertain consistent or comparable findings.

First, the ethics cases available show virtually no prosecution for misleading or deceptive conduct in negotiations. It is possible that complaints were reported and simply settled or dismissed. In terms of official enquiries and cases brought against legal practitioners for misleading or deceptive conduct, only one formally prosecuted case was found in Queensland. This may be for several reasons. As stated earlier, original complaints may have been dismissed during the standard intake process for a variety of reasons including lack of severity of the offending conduct and a decision that formal prosecution would not serve the public interest. A second reason for lack of prosecution is that any such reported cases may have been privately settled between the complainant and the legal practitioner.<sup>926</sup> Finally, a more probable reason is that because negotiations are generally private and not formally regulated, potential claimants may not file a formal complaint, either because they have achieved a

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<sup>926</sup> See Chapter 5 (The Success of Legal Ethics Codes in Controlling Lawyers' Deceptive Behaviour) for more information.

favourable result in line with their own interests in the negotiations or because they are not aware that they can file a complaint against their lawyer in this context.

Theoretically, because some deceptive or misleading conduct is ‘generally’ accepted in negotiations, clients may not consider such behaviour as unethical and may even expect it of their attorneys, perhaps as long as clients achieve their own objectives and their interests are maximised.<sup>927</sup>

Second, ethics violation cases show very little in terms of the context in which the violation occurred and whether different ethical principles were applied accordingly. By this I mean that, in most ethics violation cases, there is very little information to determine whether, for example, the lawyer was charged with misleading or deceptive conduct while in court, in mediation, in negotiation or otherwise. In the Queensland jurisdiction, the analysis of the legal ethics violation cases involving deceptive or misleading conduct revealed only one case that involved negotiation. In addition, there is little information to suggest whether different ethical standards were considered depending on the context of the situation. In most cases, if the attorney was charged with misleading or deceptive conduct, this was a sufficiently egregious violation of the professional ethics codes to sanction the attorney or strike him/her off the role, with or without additional sanctions such as costs and further continuing legal education (CLE) course requirements.

Finally, the ethics violation cases where the charge was misleading or deceptive conduct show a marked tendency towards imposing punitive judgments as opposed to remedial punishment or use of restorative justice principles. In most cases,

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<sup>927</sup> Note: This theoretical assumption would be a good topic of future empirical research on the extent to which consumers will accept or not accept potentially deceptive conduct on the part of their lawyer in relation to achieving a favourable result in the negotiations.



whether the charge was minor or major was irrelevant. Legal practitioners were still sanctioned through heavy fines, public reprimands, or being struck off the roll of practitioners. One possible reason for this is that there does not appear to be a gradation of the severity of misleading or deceptive conduct on which to objectively determine the severity of the offending conduct or an objective analysis of the severity of the charge in relation to other more serious violations of the ethics rules. In most cases, if a sufficient argument can be made that the lawyer's conduct would negatively affect the public interest or tarnish the reputation of the profession, the lawyer was considered guilty of the charges. It appears that not only are ethics violations cases frequently dismissed but that when there are official charges filed and the legal practitioner is formally prosecuted, subjective reasoning and severe punitive judgments take precedence over fully understanding the context in which the violation occurred, the intent or motive of the lawyer in possibly violating the professional ethics code, and a fully reasoned opinion that is based on more intellectual rigor and analysis of precedent. As a result, a number of legal scholars criticize legal ethics cases as failing to provide uniform guidance and succeeding only in showing conflicting judgments which do not help lawyers in achieving sound ethics as part of the public profession.<sup>928</sup>

In summary, a study of the ethics violation cases in the Queensland jurisdiction seems to indicate that if allegations involve misleading or deceptive behaviour, negotiation does not appear to be a focus for prosecution while the

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<sup>928</sup> See, eg, Haller, above n 587, 152; Linda Haller, 'Smoke and Mirrors: When Professional Discipline May Cause Harm' (2005) 8(1) *Legal Ethics* 70; Levin, above n 587, 187-210; Eileen Libby, 'When the Truth Can Wait: There are times when a lawyer may engage in a bit of deception – but not many' (2008) 94 *American Bar Association Journal* 26, 27-28 (discussing some of the inconsistencies in ethics violation cases in the United States).

disciplinary measures seem to be more punitive than reformative. The public disclosure of such cases seems to only taint the reputation of the profession. As a result, what lawyers and the legal profession face is a negative public perception consistently confirmed through independently-commissioned consumer and professional industry studies – studies which call for a change.<sup>929</sup>

## **6.5 STUDIES OF THE LEGAL PROFESSION RECOMMEND CHANGE**

The review of literature in Chapter 2 supports a conclusion that, despite the fact that practitioners, scholars, and various stakeholders acknowledge the issue of deception in negotiation, all seem powerless to do something about it. As a result, thus far, there has been no measurable action taken to address this issue. While it is plausible that a self-regulated profession can continue to disregard ‘the elephant in the room’, hoping it will go away or is a figment of someone’s imagination, consumer and industry studies of the legal profession in various common-law jurisdictions, especially in the United States, provide stark reminders of what appears to be the public’s consistent dissatisfaction with the legal profession. This feedback from the consumers of legal services should prove reason enough to finally and effectively address this issue.<sup>930</sup>

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<sup>929</sup> See generally Chapter 6, section 6.5 for a full discussion of the consumer studies reflecting the perception of the legal system and lawyers. These studies focus mainly on Australia and the United States as data was more readily available. See also Canadian Bar Association Futures Report, *Crystal Clear: New Perspectives for the Canadian Bar Association* (August 2005) <<http://www.cba.org/CBA/futures/pdf/crystalclear.pdf>> at 9 August 2010 (discussing similar issues from the perspective on the Canadian Bar Association and noting that “[p]erhaps the *biggest threat on the demand side* is the current poor image of lawyers held by the public.” (Section 2.4)).

<sup>930</sup> See, eg, Honorable Mark D Fox and Michael L Fox, ‘It’s No Joking Matter: Our Profession Requires Greater Civility and Respect’ (2009) *New York State Bar Association Journal* 11, 14 (putting into context the need to maintain the high standards of the profession of law as the means to “safeguard society” and “the base upon which our democratic government...finds its foundations.”) The more important point by Fox and Fox is a reminder to practitioners that the legal profession is meant to stand as “one of the bulwarks of an ordered society of laws” and “the guardians of law and justice” such that if the legal profession is seen to fail (in Fox and Fox’s example of being uncivil), then that ordered

A historical perspective of the views of consumers of legal services is important in establishing the need for change. This is further reinforced by studies of the legal profession by various industry organisations. The consumer perspective is presented first, beginning with one of the most noteworthy consumer studies on lawyers and the legal profession from the United States. This is followed by studies of the legal profession by industry organisation.

One of the first relevant consumer studies on lawyers and the legal profession is the Gallup Organisation's Honesty and Ethics poll in the United States. In 1976, the Gallup Organisation of the United States conducted one of the earliest consumer studies of honesty and ethics across various industries and professions, including lawyers and the legal profession.<sup>931</sup> Since 1976, the Gallup poll on honesty and ethics has been conducted in the United States on a yearly basis. What is astonishing is the consistency with which lawyers and the legal profession are viewed by the U.S. public on the honesty and ethics ratings since 1992.<sup>932</sup> Between 1992 and 2006 inclusive, only between 13% and 18% of respondents rated the honesty and ethical standards of lawyers as either 'high' or 'very high',<sup>933</sup> with the average rating across these years being only 15.56% of the surveyed public who said that the honesty and ethics standards of lawyers was either 'high' or 'very high'. In contrast, between

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society would be in jeopardy and regress, even if the failure is a perception of failure as discussed in the context of these consumer studies.

<sup>931</sup> See generally The Gallup Organisation at [www.gallup.com](http://www.gallup.com). The Gallup Organisation is based in the United States and has offices in Australia. To date, the Honesty and Ethics poll has been conducted only in the United States. As such, the discussion in this section about the results of the Gallup's annual Honesty and Ethics poll applies only to the United States. The results may be applicable to Australia and other jurisdictions given their mutual association to the same common law jurisdiction practices.

<sup>932</sup> Note: Data is publically available online for the period of 1992-2008. See generally <<http://www.usatoday.com/news/polls/tables/live/2006-12-11-ethics.htm>> at 9 August 2010. As such, these results are the focus of this discussion. Data is not publically available online for the periods 1976-1992 and has been requested by Gallup.

<sup>933</sup> See generally <<http://www.usatoday.com/news/polls/tables/live/2006-12-11-ethics.htm>> at 9 August 2010.

1992 and 2006 inclusive, the public rated another major profession, medical doctors, as between 47% and 69% in terms of having ‘high’ or ‘very high’ honesty and ethical standards,<sup>934</sup> with the average across these years being 55.69%. As compared with other professions, lawyers were not considered honest or ethical.

In addition, when asked about the respondents’ overall view of a particular industry, the trend analysis from August 2001 to August 2008 shows a consistently negative view towards the legal industry with respondents predominantly having a ‘neutral’ or ‘very/somewhat negative’ view of the legal industry.<sup>935</sup> Across this same time period, each year yielded a negative ‘net positive’ result in terms of the public’s overall view of the legal industry.<sup>936</sup>

A second important consumer study of the legal profession took place in 1993 in the United States. In 1993, the American Bar Association commissioned a comprehensive survey to determine the U.S. public’s attitude towards lawyers, the American legal system and the ABA itself. The survey was a nationwide telephone survey of 1,202 adults who were considered representative of the public combined with various focus groups to elicit comments.<sup>937</sup> The characteristics of the representative sample in the study included the following: 1) about two-thirds of those surveyed had retained a lawyer in the prior 10 years; 2) three out of four of those surveyed said they personally knew a lawyer; 3) half of those surveyed said they dealt with a lawyer on a semi-regular basis; and 4) one-fourth of those surveyed had never used a lawyer at all.<sup>938</sup>

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<sup>934</sup> Ibid.

<sup>935</sup> Ibid.

<sup>936</sup> Ibid.

<sup>937</sup> Hengstler, above n 13, 60-61.

<sup>938</sup> Hengstler, above n 13, 61.

While lawyers generally rated highly and positively with regards to competency, knowledge, and zealous representation, this study also ‘suggest[s] a disturbing pattern that the more a person knows about the legal profession and the more he or she is in direct personal contact with lawyers, the lower an individual’s opinion of them.’<sup>939</sup> This seems to suggest that in 1993, while the public feels positively about *what* lawyers do, they are not happy with *how* lawyers do what they do, especially where those tasks impact on their clients. In essence, lawyers are viewed as competent on the hard skills (knowledge of the law, competent in the courtroom, zealous representation for their clients, etc.) while lacking on soft skills such as being compassionate, caring, and having high ethical standards. These soft skills are what the public seems to expect of professions whom they rate highly on nearly every factor.

In this same survey, the issue of legal ethics was quite problematic as only 22% of those surveyed would classify lawyers as ‘honest and ethical’ and nearly half of those surveyed (48%) said that ‘as many as 3 in 10 lawyers lack the ethical standards necessary to serve the public’.<sup>940</sup> The survey did not focus exclusively on any one aspect of a lawyer’s role such as whether they were acting as an advocate, negotiating, mediating or representing the client in a trial. However, given that negotiation is such an important and consistent part of what a lawyer does on a daily basis, one could extrapolate that these findings could apply to deception in negotiation as honesty infers that there is no deception, regardless of the task at hand.

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<sup>939</sup> Hengstler, above n 13, 62.

<sup>940</sup> Ibid. This 48% for lawyers was significantly higher than the ratings for accountants (22%), doctors (28%) and bankers (30%). See also Rhode, above n 151, 3-7.

While Hengstler argues that these ratings are likely the result of the public's misunderstanding of the ethics of the legal profession, it nevertheless points to a glaring discrepancy between how the public expects lawyers to act, how lawyers themselves expect to act within the bounds of professional duty, the public's understanding of the nature of legal ethics, and the profession's lack of effort in reducing these glaring discrepancies of perception between the law, legal ethics, and the public which it is meant to serve.

For example, in this same 1993 ABA survey, when consumers were asked what they considered as the most important roles for lawyers and their most important priorities as a profession, only 29% cited 'an advocate for their client's interests' as critical while a majority (52%) regarded 'a protector of basic rights' as the top purpose of a lawyer and 37% selected 'a prosecutor of wrong-doers' as an important role for lawyers.<sup>941</sup> This 1993 ABA survey affirms that the legal profession's perceptions of the primary role of lawyers in the United States (i.e., as zealous advocates for their clients within the bounds of the law) is markedly different and out of step with what consumers of legal services customers expect and are now demanding with ever-increasing urgency.

A third noteworthy consumer study of the profession is the April 2002 American Bar Association Section of Litigation's commissioned study on the United States' public perception of lawyers. The purpose of the 2002 ABA study is similar to that of the 1993 ABA study discussed earlier in this section. However, unlike the 1993 ABA study, the 2002 ABA study consisted of three primary stages: 1) a

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<sup>941</sup> Hengstler, above n 13, 62. In addition to 29% who cited "an advocate for their client's interests" as critical, 26% selected "a settler of disputes", 20% selected "a defender of the underdog", and 13% selected "leader in the community".

national survey by telephone of 450 representative U.S. households in April 2001; 2) ten focus group discussions in five U.S. markets in summer 2001; and 3) a national survey by telephone of 300 representative U.S. households in January 2002.<sup>942</sup>

The results of the national telephone surveys found that while the American public thinks lawyers are competent, knowledgeable about the law, and provide good practical service to their clients,<sup>943</sup> the American public considers American lawyers to be ‘greedy, manipulative, and corrupt’.<sup>944</sup> The study further found lawyers to be deceptive and misleading. Specifically, respondents stated that lawyers ‘misrepresent their qualifications, overpromise, are not upfront about their fees and charge too much for their services, take too long to resolve matters, and fail to return client phone calls’.<sup>945</sup> As a result, it is not surprising that one of the other key findings was the public’s belief or perception that the state bar associations of the individual states do a poor job of regulating and policing lawyer conduct in the interests of the public.<sup>946</sup>

With regards to manipulative behaviour, over 73% of respondents believe lawyers not only manipulate the system but they also manipulate the truth to win at all costs.<sup>947</sup> Corruption was another issue for the public. The study reported that respondents, through personal experience, believe that lawyers use unethical and

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<sup>942</sup> American Bar Association, *Public Perception of Lawyers: Consumer Research Findings*, above n 13, 2-4.

<sup>943</sup> American Bar Association, *Public Perception of Lawyers: Consumer Research Findings*, above n 13, 4, 18. Interestingly enough, over 59% of those surveyed agreed that lawyers were knowledgeable and interested in serving their clients. In addition, many blamed the *system*, not lawyers, as the source of the problem.

<sup>944</sup> American Bar Association, *Public Perception of Lawyers: Consumer Research Findings*, above n 13, 4.

<sup>945</sup> Ibid.

<sup>946</sup> Ibid.

<sup>947</sup> American Bar Association, *Public Perception of Lawyers: Consumer Research Findings*, above n 13, 7-8.

sometimes illegal tactics.<sup>948</sup> As lawyers are constantly negotiating on behalf of their clients, the use of deception in negotiation would be included in the use of such unethical or illegal tactics.<sup>949</sup> According to results of the focus groups conducted as part of this 2002 ABA study, illegal or unethical tactics included staging accidents, offering to bribe prosecutors or judges, and sending clients to doctors for injuries they do not have.

Overall, while lawyers are seen as providing a valuable and much-needed service, especially in times of crisis, the U.S. public perception of lawyers and the legal profession is consistently low, even where they have had a good experience with lawyers. This appears to be a direct reflection not of *what* lawyers do for clients but of *how* they perform their jobs and *how* their methods, tactics and interactions with clients are perceived by the public, regardless of whether the end result for the client is positive.

A final consumer study of the legal profession worth noting is the latest 2008 Gallup annual Honesty and Ethics poll, where lawyers were considered one of least well-rated professions for honesty and ethics, second only to labour union leaders.<sup>950</sup> Only 18% of respondents rated lawyers' honesty and ethics as 'very high/high' while 45% rated lawyers' ethics and honesty as 'average' and 37% rated lawyers' ethics and honesty as 'low/very low'.<sup>951</sup> Once again, these results with respect to lawyers and the legal field are consistent with prior years' results in the Gallup Honesty and Ethics annual poll, demonstrating that lawyers and the legal field are rated less favourably

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<sup>948</sup> American Bar Association, *Public Perception of Lawyers: Consumer Research Findings*, above n 13, 9.

<sup>949</sup> See Lewicki and Robinson, above n 536, 665-682; Rivers, above n 77.

<sup>950</sup> See generally Lydia Saad, *Nurses Shine, Bankers Slump in Ethics Ratings* (2008) <<http://www.gallup.com/poll/112264/Nurses-Shine-While-Bankers-Slump-Ethics-Ratings.aspx>> at 9 August 2010.

<sup>951</sup> Ibid.



when compared against results for medical doctors and sometimes worse than business executives.<sup>952</sup>

With regards to consumer views of the legal profession, these statistics seem generally consistent with the annual Gallup Organisation Honesty and Ethics consumer polls and ABA consumer studies discussed above. Next, the focus is on the studies of the legal profession and its members conducted by legal and industry organisations. These studies reflect the views of current and future lawyers about the legal profession.

In 1994, the Trade Practices Commission of Australia undertook a similar study of the legal profession in Australia though the focus was primarily the government's perspective of the legal profession rather than the consumer perspective. However, since government is often a purchaser of legal services, government is also a consumer.

In March 1994, the Trade Practices Commission of Australia (The Commission) published its final report on a study of the legal profession.<sup>953</sup> Overall, the Commission concluded that the 'Australian legal profession is heavily over-regulated and in urgent need of comprehensive reform'<sup>954</sup> because these regulations 'impose substantial restrictions on the commercial conduct of lawyers and on the extent to which lawyers are free to compete with each other for business.'<sup>955</sup> The Commission looked at regulations affecting the structure of the legal services market as well as the regulations affecting and controlling the conduct of legal

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<sup>952</sup> Saad, above n 950. See generally <<http://www.usatoday.com/news/polls/tables/live/2006-12-11-ethics.htm>> at 9 August 2010.

<sup>953</sup> See generally *Study of the Professions – Legal: Summary of Final Report*, above n 925; Trade Practices Commission, *Study of the Professions – Legal profession: Issues Paper* (1992); See also *Trade Practices Commission, Study of the Professions – Legal: Draft Report* (1993).

<sup>954</sup> *Study of the Professions – Legal: Summary of Final Report*, above n 925, 3.

<sup>955</sup> *Ibid.*

practitioners.<sup>956</sup> The Commission's findings and recommendations on the regulation of the conduct of legal practitioners are of particular importance to this thesis.

With regards to the regulation of lawyer conduct, the Commission recommended that the *Trade Practices Act 1974* (the TPA) should cover the conduct of legal professionals, the market conduct of the legal profession as a whole, and extend even to 'the rule making and other activities of its professional associations.'<sup>957</sup> The legal profession, at the time of the Commission's report, is said to be exempt from the provisions of the Act because the profession is considered to be self-regulated and bound by a myriad of professional rules, such as court rules and ethics codes; however, others have argued that the TPA does apply to the legal profession as well because the provision of legal services is a trade like any other profession and serves the public, who is the intended beneficiary of the protections of the *Trade Practices Act 1974*.<sup>958</sup> By 2010, this latter view was reinforced by the Australian Competition and Consumer Commission, who published a formal document on the application and impact of the *Trade Practices Act* to all professions, including the legal profession.

By recommending that the *Trade Practices Act 1974* apply to the legal profession, the Commission is making some implicit statements, namely that the conduct of legal professionals in general is deceptive and misleading, especially since

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<sup>956</sup> *Study of the Professions – Legal: Summary of Final Report*, above n 925, 4-6.

<sup>957</sup> *Ibid.*

<sup>958</sup> See, eg, Pengilley, above n 576, 113-129 (discussing the effects of *Trade Practices Act 1974* s 52 on common negotiating techniques of legal professionals, which includes deceptive and misleading conduct). See also Australian Competition and Consumer Commission, *Professions and the Trade Practices Act* (2010) 19-20 <<http://www.accc.gov.au/content/item.phtml?itemld=926503&nodeId=71b6c165abc78f1a60f0a1643c9367&fn=Professions%20and%20the%20TPA.pdf>> at 31 July 2010 (specifically reinforcing the obligation of the professions to refrain from deceptive and misleading conduct when dealing with clients). This latter document is an updated document highlighting and reinforcing the application of the TPA on all professions in Australia, including the legal profession.

one of the key purposes of the Act is to prevent incentives to mislead consumers of products and services. In addition, the Commission's report also seems to allude to the fact that current legal ethics rules and rules governing professional and ethical standards and disciplinary procedures are not effective in curtailing misleading behaviour even as the rules on their face explicitly prohibit deceptive or misleading conduct by legal professionals.<sup>959</sup>

If the *Trade Practices Act 1974* does apply to the legal profession, it would actually put the legal profession on the same footing as any other business or occupation where a certain amount of deceptive or misleading conduct is permissible.<sup>960</sup> While such conduct might be reduced under the *Trade Practices Act 1974*, the conduct would not be entirely eliminated because under the current legal ethics rules, any form of deceptive or misleading conduct, including the use of such conduct in negotiations is strictly prohibited and subjects the legal professional to disciplinary proceedings for ethics violation.

As discussed in earlier chapters, the adoption of the *Trade Practices Act 1974* as applying to legal professions would likely put it at odds with the legal ethics rules. These inconsistencies will potentially cause inconsistent lawyer behaviour in regards to negotiations and needs to be addressed. One way to address this issue is through strategic policy reforms as discussed further in Chapter 7.

The Commission also recommended, among other things, greater effectiveness and public accountability of the legal profession, an increase in the type of matters that could be the subject of a formal complaint against a legal professional, and lay

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<sup>959</sup> See Chapter 4 for a full discussion of the specific legal ethics codes analysed in this thesis.

<sup>960</sup> Note: I am making a distinction between a 'profession' and any other 'occupation'. For further discussion see Lakhani, above n 268, 61 (discussion lawyers as part of a profession versus any other occupation and therefore why the profession expects a higher standard of behaviour).

representation on complaints and disciplinary tribunals to be at least equal to the number of lawyer representatives on the same panels.<sup>961</sup>

Regardless of any inconsistencies between what the Commission recommends and what the profession deems appropriate, it is clear that professional reforms are imperative to not only allow for sustainability of the legal profession in a global market but also to ensure greater public accountability and informed choice. A significant part of this reform mandate is targeted towards *how* legal professionals carry out the business of justice on a daily business – a business that has constant and daily negotiations as a foundation.

A second study of the legal profession worth noting is a recent 2008 commissioned study in Australia. In November 2008,<sup>962</sup> *The Australian* reported on a national, large scale commissioned study of law students and the legal profession conducted by Professor Ian Hickie at the Sydney University Brain and Mind Institute.<sup>963</sup> The study involved a survey of 2,413 lawyers consisting of 738 students

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<sup>961</sup> Note: Some of these have been addressed in Queensland through the implementation of the Legal Services Commission through the *Legal Profession Act 2004* (Qld). However, at the time of writing, lay representation on ethics violation complaints and disciplinary bodies was not equal to lawyer representation and lay representatives felt overwhelmed or overlooked in terms of their role and influence. See e.g., Haller, above n 587, 1; Haller and Green, above n 701, 145 and 157 (suggesting that lay member and practitioner representation and input into disciplinary panels and decisions has actually decreased since the initial study conducted in 2001). See Chapter 5 (The Success of Professional Ethics Codes in Controlling Lawyers' Deceptive Behaviour) for more information on this topic.

<sup>962</sup> Note: The full report was released in January/February 2009. See N J Kelk, G M Luscombe, S D Medlow and I B Hickie, *Courting the blues: Attitudes towards depression in Australian law students and legal practitioners*, BMRI Monograph 2009-1 (2009) <<http://www.bmri.org.au/research/mental-health-clinical-translational-programs/index.php>> at 9 August 2010; Ian Hickie, *The mental health of Australian lawyers: A challenge for the law schools and the profession* 18-44 (18 September 2008) <<http://www.bmri.org.au/research/mental-health-clinical-translational-programs/index.php>> at 9 August 2010.; Beaton Consulting, *Annual Professions Study 2007* (2007).

<sup>963</sup> See also Nicola Berkovic, *Research finds depression very high in legal profession* (2008) 2 *The Australian* <<http://www.theaustralian.news.com.au/story/0,25197,24367557-17044,00.html>> at 9 August 2010.

from 13 law schools nationally, 924 solicitors, and 751 barristers.<sup>964</sup> Professor Hickie cited the competitive and individualistic nature of the profession versus a more collegiate approach as a factor in the findings which confirmed high rates of physical and mental ailments within the legal profession.

These findings are consistent with studies among lawyers in the United States. The views among lawyers found that one of the biggest concerns was the standing of the profession in the eyes of both lawyers and the public.<sup>965</sup> Lawyers in the United States further agreed that improving the standing and perception of the profession was the ABA's top priority. Lawyers also reported 'a decline in ethical values and the loss of the professional soul'<sup>966</sup> as a result of the current culture of the profession being more profit-oriented due to increased commercialisation and competition.<sup>967</sup> In addition, lawyers cited a decreased emphasis on public service, instability in lawyer-client relationships because of competition and market-driven practices, increased billable-hour requirements, and ethical rules which are not demanding and under-enforced as other reasons for a feeling of general malaise about the profession.<sup>968</sup> This general malaise about the profession and law practice has resulted in a profession marred by high rates of thoughts of suicide,<sup>969</sup> severe depression, alcohol and drug

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<sup>964</sup> The University of New South Wales, *Depression a disabling problem in legal profession – study* (2009) <[http://www.unsw.edu.au/news/pad/articles/2008/sep/Jepson\\_release.html](http://www.unsw.edu.au/news/pad/articles/2008/sep/Jepson_release.html)> at 9 August 2010. See also Kelk et al, above n 962.

<sup>965</sup> Hengstler, above n 13, 60.

<sup>966</sup> Rhode, above n 151, 8.

<sup>967</sup> Rhode, above n 151, 9.

<sup>968</sup> Rhode, above n 151, 9-12.

<sup>969</sup> Michael J Sweeney, *The devastation of depression: Lawyers are at great risk – It's an impairment to take seriously* (2009) <<http://www.abanet.org/barserv/22-6dev.html>> at 9 August 2010 (discussing a 1991 North Carolina Bar survey that found that 12 percent of members said 'they contemplated suicide at least once each month'); E Mounteer, 'Depression Among Lawyers' (2004) 33 *Colorado Lawyer* 35 ((most lawyers who suffer from depression also suffer from suicidal thoughts); Richard G Uday, 'That Frayed Hope' (2003) *Utah State Bar Journal* (citing Meyer J Cohen, Bumps in the Road, GPSOLO, July/Aug. 2001, at 20) (citing suicide as the leading cause of premature death by lawyers); Lynn Johnson, 'Stress Management' (2003) *Utah State Bar Journal*. (discussing the 1992 Annual Report of

addiction, and other ailments that affect the physical and mental health of the legal professional at rates nearly three times higher than the general public.<sup>970</sup>

As discussed in earlier chapters, the overly competitive nature at the heart of an adversarial approach in the legal system and in negotiations fosters deceptive and misleading conduct because the core of competitive negotiations is seen as a game where winning takes precedence over anything else, including justice. For example, the use of terms such as ‘plaintiff’ and ‘defendant’ or ‘state versus defendant’ creates the perception of competition and adversarial challenges. As such, these findings should not be surprising but serve as an immediate call to action.

In summary, the primary activity of lawyers on a daily basis is negotiation, whether on behalf of a client or in serving a client’s interests when engaged with opposing counsel or the courts. Therefore, how lawyers carry out this function is what clients see the most. What clients see and experience most often is likely reflected in their perception of lawyers and the legal profession. As such, a change in *how* lawyers negotiate (i.e., through the use of specific strategies and tactics) is one strategic and effective way to have a positive impact on the public perception of lawyers and the legal system.<sup>971</sup> Unfortunately, to date, a number of proposed solutions have failed to create a sense of urgency in addressing this issue.

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the National Institute of Occupational Safety and Health which found that male lawyers are twice as likely to commit suicide as compared with the general population); Hickie, above n 962, 18-44.

<sup>970</sup> Rhode, above n 151, 8-9 (citing Nancy McCarthy, ‘Pessimism for the Future,’ (1994) *California Bar Journal* 1; Mary Ann Glendon, *A Nation under Lawyers* (1994) 85-87. See also Berkovic, above n 963, 2. The findings were reported by a study conducted by Professor Ian Hickie at the Sydney University Brain and Mind Institute. Professor Hickie cited the competitive and individualistic nature of the profession versus a more collegiate approach as a factor in the findings.

<sup>971</sup> See Chapter 7 (Implications for Law Reform) for a detailed discussion of the strategic policy reform proposals recommended in this thesis.

## 6.6 FAILURE OF PRIOR PROPOSED SOLUTIONS AND A CALL TO ACTION

The purpose of this section is to discuss the three primary ways in which practitioners and academics have attempted to resolve the issue of deception in negotiation and provide eight core reasons why these solutions have not been adopted or implemented.

Both practitioners and academics have recognised since the 1980s that there is an issue with the use of potentially deceptive behaviours by lawyers in negotiation. The prevalence of literature and debate on this issue, dating as far back as the early 1960s,<sup>972</sup> is impossible to ignore. In addition, practitioners and scholars have proposed a myriad of solutions aimed at addressing the issue of lawyer deception in negotiations. Yet it seems that, based on the review of literature in Chapter 2, none of these proposed solutions have been accepted or adopted. This section looks at prior proposed solutions, the possible reasons why they were not adopted, and why there is now an urgent call to action to address this foundational issue within the legal profession. This section begins with some of the proposed solutions to the issue of lawyers' deceptive tactics in negotiation.

One of the most common solutions has been to adopt an entirely new legal ethics model as proposed by scholars such as Menkel-Meadow, Simon, Thurman, Fletcher, and Parker and Evans. This comes on the heels of years of commentary and arguments that the current legal ethics model is too adversarial<sup>973</sup> and that legal ethics

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<sup>972</sup> Carr, above n 532, 143-153 ("But from time to time every businessman, like every poker player, is offered a choice between certain loss and bluffing within the legal rules of the game. If he is not resigned to losing, if he wants to rise in his company and industry, then in such a crisis he will bluff and bluff hard."). While the focus of this article appears to be the business world, lawyers are business people as well and law firms are businesses with a very strong profit motive.

<sup>973</sup> See, eg, Rhode, above n 151, 8-12; David Luban (ed.) *The Ethics of Lawyers* (1994); Menkel-Meadow, above n 19, 761; D'Amato and Eberle, above n 174, 764-770 (referring to this dominant model as the 'autonomy model' of legal ethics).

today should be more socially responsible in a way that is attuned to and ‘reflects public values and curbs excessive adversarial processes.’<sup>974</sup> The core argument seems to be that the adversarial nature of the current legal ethics model is flawed and causes lawyers to be too competitive and thus resort to one of the most common competitive negotiating tactics – deception – in order to win at all costs.<sup>975</sup>

As introduced earlier, W H Simon is among those who recommend adopting a new legal ethics model. Simon proposed adopting a more contextual or situation ethics model. According to Simon, the ‘dominant’ view of legal ethics (i.e., the adversarial model) seems to encourage injustice, even if it does so unconsciously or subconsciously.<sup>976</sup> Simon’s proposal is to adopt a more contextual ethic whose ‘basic maxim [must be] that the lawyer should take such actions as, considering the relevant circumstances of the particular case, seem likely to promote justice’.<sup>977</sup> Under Simon’s approach, a lawyer’s personal ethical views of what is right and wrong would take greater precedence over the prevailing legal ethics requirements and obligations. Thurman<sup>978</sup> and Fletcher<sup>979</sup> proposed similar approaches and explored the implications of a contextual or situational ethics model.

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<sup>974</sup> Rhode, above n 151, 8-12 (“...professional conduct implicates public values, and they [public values] should figure more prominently in the formulation and enforcement of professional standards.”). See also Simon, above n 191, 2 (“No social role encourages such ambitious moral aspirations as the lawyer’s, and no social role so consistently disappoints the aspirations it encourages.”).

<sup>975</sup> Deborah L Rhode, ‘Symposium Introduction: In Pursuit of Justice’ (1999) 51(4) *Stanford Law Review* 867 (“...bar’s prevailing ethics norms are fundamentally flawed and that their inadequacies carry a substantial cost for both the profession and the public.”).

<sup>976</sup> Simon, above n 191, 109; See also M B E Smith, *The Practice of Justice: A Theory of Lawyers’ Ethics. (Review Essay / Can a Lawyer Be Happy?)* (2000) 2 <<http://www.articlearchives.com/law-legal-system/legal-services-lawyers/1051660-1.html>> at 9 August 2010.

<sup>977</sup> Simon, above n 191, 9; Mary Jo Eyster, ‘Clinical Teaching, Ethical Negotiation, and Moral Judgment’ (1996) 75 *Nebraska Law Review* 752, 782-790 (agreeing with Simon). Cf Smith, above n 976. This article is also published in *Criminal Justice Ethics* publication. Smith criticizes Simon’s approach and does not consider it practical or viable for practitioners.

<sup>978</sup> Thurman, above n 148, 103.

<sup>979</sup> Fletcher, above n 192, 35.



Another proponent of adopting a new legal ethics model is Parker and Evans. Parker and Evans as well as Gilligan, among others, recommend a move towards an ethics of care model<sup>980</sup> where lawyers would adopt a more relational lawyering approach where personal values and context are key factors in the lawyer's approach to lawyer-client relations.

In addition, D'Amato and Eberle propose adopting a deontological model of legal ethics as opposed to the current model that appears to be based on utilitarianism principles.<sup>981</sup> Under the deontological model, D'Amato and Eberle argue that four primary rules would govern ethical decision-making by lawyers.<sup>982</sup> These sample rules, in effect, attempt to put a hierarchy of priority where duties to the client, court, and justice system conflict. They seem to set up rules or guidelines for when one duty might trump another. Presumably, the rule imposing a moral obligation to avoid fraud and perjury would encompass the use of deception in negotiations. Notwithstanding the primary criticism that this model might compromise attorney-client confidentiality to some degree as well as the issue of determining how many other 'rules' might be required, D'Amato and Eberle argue that these rules are currently implied and reflected in the *Model Rules*<sup>983</sup> and only puts the client on notice that confidentiality is not the only or primary value within the legal system.<sup>984</sup> Therefore, client confidentiality cannot be used to bypass standard norms of expected behaviour, especially when it comes to a conflict between disclosure and harm to another party.

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<sup>980</sup> Parker and Evans, above n 156, 23, 31; Maughan and Webb, above n 188, 36; Gilligan, above n 189.

<sup>981</sup> D'Amato and Eberle, above n 174, 772-774.

<sup>982</sup> D'Amato and Eberle, above n 174, 772-774; See also Chapter 2 (Review of Literature) for more information on this topic.

<sup>983</sup> *Model Rules of Professional Conduct* (1983), Rule 1.6(b) (1) (“(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm...”).

<sup>984</sup> D'Amato and Eberle, above n 174, 778.

A second proposed solution to the issue of lawyer deception in negotiation is to impose candour in negotiations either through additional rules of legal ethics or stricter enforcement mechanisms. Both Judge Rubin and supporters such as Thurman argue that the legal ethics rules represent only a minimal standard of behaviour and that lawyers are obligated to always be scrupulously honest in all their dealings, including negotiations.<sup>985</sup> Thurman contends that lawyers should be expected to adhere to a higher level of truthfulness than the minimum standard imposed by legal ethics codes.<sup>986</sup>

For example, Menkel-Meadow proposes requiring honesty in negotiations by imposing a golden rule of candour.<sup>987</sup> According to Menkel-Meadow, this golden rule of candour appears to be a less rigid form of the current paternalistic standard in favour of a more self-interested standard that consists of two enquiries of ethical decision-making: 1) whether the lawyer as the *client* rather than the lawyer as a *professional* would want to know the truth in a given situation (thus asking the lawyer to put himself/herself in the shoes of the client in regards to truth-telling);<sup>988</sup> and 2) whether '*[t]he lawyer should be as truthful to the client as she expects the client to be with her.*'<sup>989</sup> Menkel-Meadows sees this second enquiry of the Golden Rule of Candour as embodying the full potential of reciprocal honesty as imagined by the rule, thus making the lawyer's moral obligation to the client very clear and less subject to ambiguity and concern regarding ethical decision-making.<sup>990</sup>

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<sup>985</sup> Rubin, above n 69, 577

<sup>986</sup> Thurman, above n 148, 103. See also Loder, above n 533, 87.

<sup>987</sup> Menkel-Meadow, above n 19, 761.

<sup>988</sup> Menkel-Meadow, above n 19, 770.

<sup>989</sup> Menkel-Meadow, above n 19, 780 (italics in the original).

<sup>990</sup> Ibid.

One of the more obvious issues with Menkel-Meadow's suggestion is that the client's moral code may be in conflict not only with the legal profession's minimal ethical standards but may also conflict with a lawyer's own stricter standard of ethics. In addition, how would such a golden rule of candour be enforced or measured since adopting it would seem to place the lawyer once again in a contextual mode of ethical decision-making with the added variable of taking into account the client's or his/her community's ethical standards? Should one be compromised for another?

Loder offers yet another option for imposing by reframing the lawyers' view of their work and the value of their roles. According to Loder, the legal profession would be well-served to question the apparent majority opinion that negotiation is inherently deceptive.<sup>991</sup> Loder argues that instead of accepting that negotiations are inherently deceptive, lawyers should view negotiation as a truth-seeking process.<sup>992</sup> She, therefore, condones regulations that encourage affirmative disclosures during the process as well as affirmatively discouraging deception by statements and/or conduct.<sup>993</sup> In effect, it seems Loder would prefer to see the current rules enhanced to include explicit prohibitions on deceptive conduct as well as rules requiring lawyers to affirmatively disclose certain information to their counter-parts in the interests of promoting honesty and truth-seeking within a more collaborative negotiations process.

Finally, a third solution offered to address the issue of lawyer deception in negotiation is to simply do nothing about it. This view appears to stem from three primary observations. First, as suggested by White, deception in negotiation is a *sine*

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<sup>991</sup> Loder, above n 533, 102.

<sup>992</sup> Loder, above n 533, 99.

<sup>993</sup> Loder, above n 533, 100. Reed does not go into details on how these rules should be formulated or enforced.

*qua non*<sup>994</sup> of lawyers and the legal profession, regardless of what the ethical rules say. White has argued that regulating deception by lawyers is impossible because deception is the essence of negotiation as a process.<sup>995</sup> Second, White argues that regulating deception in negotiation by lawyers would be difficult because of the paradoxical nature of the negotiator who must be fair and truthful as well as deceptive. Third, there is a very low probability of punishment for deception in negotiation, thus making any mandatory rules against deception subject to failure.<sup>996</sup> According to White, imposing rules of candour in this arena and the potential failure of such rules due to ineffective enforcement would have a greater negative impact on the legal profession than simply doing nothing about it. This potentially negative impact fuels the argument that more rules will not necessarily resolve the issue and only cause further confusion among legal practitioners.

To date, this third solution, namely to do nothing about the issue of lawyer deception in negotiation, appears to be most common, especially in the United States, where there has been widespread criticism of the current model rules of professional conduct and its apparent explicit support for deception in negotiation.<sup>997</sup> This also appears to be the preferred solution in other common law jurisdictions such as Australia, most of Canada, Hong Kong, and the United Kingdom, where, on the face, legal ethics codes appear to prohibit deception in any form yet do not seem to address negotiation as a separate subject with regards to such prohibitions.<sup>998</sup>

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<sup>994</sup> *Oxford English Dictionary*, above n 33 (a Latin legal term for "(a condition) without which it could not be" or "but for..." or "without which (there is) nothing.")

<sup>995</sup> White, above n 60, 927-928.

<sup>996</sup> White, above n 60, 927.

<sup>997</sup> Referring mainly to Rule 4.1 of the American Bar Association's Model Rules of Professional Conduct

<sup>998</sup> See, eg, Mize, above n 66, 245 (discussing the lack of clarity in the professional ethics codes of New Zealand regarding this issue). The same could be said of the legal ethics codes analysed in this thesis.

To date, three primary solutions have been proposed to manage the issue of lawyer deception in negotiation. While the decision to do nothing and thus refrain from managing lawyer deception in negotiation may be justified, the prevailing news from consumer and industry studies of the profession discussed above suggest that this issue can no longer be ignored. There are at least eight plausible reasons why the proposals above have not as yet been adopted and why the issue of lawyer deception in negotiation remains an uncharted area for serious reform.

The first most common reason for lack of reform on this issue appears to be the nature of the negotiation process itself. Negotiation is largely seen as a private dispute resolution process.<sup>999</sup> The private, informal, and voluntary nature of negotiations as well as its flexibility and confidentiality is precisely what makes it an attractive process for deal-making and reaching acceptable agreements. Behaviours in negotiation are not subject to the same public scrutiny as behaviours in more public dispute resolutions forums such as arbitration or trials.<sup>1000</sup> Negotiation, at least to date within the legal forum, has not been subject to formal rules and regulation or ethical standards. Unlike mediation, which has undergone an evolution to now be formally recognised as a function of lawyers<sup>1001</sup> with specific mediation ethics codes and accreditation requirements, negotiation has not been part of the same evolutionary process. Yet negotiation is an integral foundation process to mediation and other recognised dispute resolution processes.

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See Chapter 4 (Efforts by Professional Ethics Codes to Regulate Deceptive Behaviours in Negotiation) for a detailed study and discussion of legal ethics codes.

<sup>999</sup> White, above n 60, 926; Mize, above n 66, 246-247 (discussing the features of negotiation which make it hard to regulate in terms of deception or, as Mize terms it, strategic posturing.).

<sup>1000</sup> White, above n 60, 926.

<sup>1001</sup> Note: By this I mean that nearly all the common-law legal ethics codes studied in this thesis recognise the lawyer's role as a mediator (third-party neutral) by stipulating this in a separate chapter of the legal ethics code with specific legal ethics rules or referring to it in the body of the legal ethics code.

Because of the private and informal nature of negotiation, the opportunities to use deceptive tactics are abundant and the chance of punishment for such behaviour is low. In addition, negotiation is ubiquitous to society since it happens in various forums on a daily basis. Finally, the prevailing literature on negotiation seems to glorify the level of acceptable lying and misrepresentation in negotiations, making it harder to regulate.<sup>1002</sup>

A second reason for lack of reform on the issue of lawyer deception in negotiation is that for many practitioners and scholars, law is considered just a game with its own set of unique rules.<sup>1003</sup> An integral component of those who consider law as just a game is that negotiation is also a game. It is not separate from law but integrated into the business of law. Because negotiation is considered integral to the practice of law,<sup>1004</sup> it could be argued that not only is it inefficient to impose harsh regulations around the behaviour of a 'game', but that changing the rules of the game would only confuse the players, who already accept the rules, written or not.<sup>1005</sup> This view has as much to do with prevailing negotiation theory and principle as with the limitations of the legal system. The impact of negotiation theory and principles on the lack of reform is discussed briefly below.

First, negotiation theory and principles recognizes the use of distributive, fixed-pie, competitive negotiation tactics, including deception.<sup>1006</sup> While negotiation

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<sup>1002</sup> See, eg, Karrass, above n 919, 23, 107; Karrass, above n 919, 187. Karrass is regarded as a leader in business negotiation books, and actually states that bluffing and a level of misrepresentation are part of negotiation.

<sup>1003</sup> *Discussion Paper 62*, above n 560, 7; Cooley, above n 27, 274-276; Van M Pounds, 'Promoting Truthfulness in Negotiation: A Mindful Approach' (2004) 40 *Willamette Law Review* 181, 189.

<sup>1004</sup> Wetlaufer, above n 31, 1220. There are also numerous books and articles that support this.

<sup>1005</sup> Cf Wetlaufer, above n 31, 1248-1250 (arguing that the 'it's part of the game' excuse is ethically impermissible because there are no rules to negotiation within the meaning of the word 'rules').

<sup>1006</sup> Note: Some would argue that distributive, fixed-pie negotiations is no longer the more widely supported negotiation theory and that interest-based negotiation is the new model (See, eg, Bordone,

theory does not directly support the use of lying in negotiations, it does recognize that parties to a negotiation, even one that starts out as interest-based, may engage in deceptive tactics as part of the game. As discussed earlier in Chapter 2 regarding various bargaining ethics models, a negotiator with a ‘poker’ ethic,<sup>1007</sup> end-results ethic or personalistic ethics that condones lying is not likely to have a problem with using deceptive tactics, regardless of his opponent’s view or ethics model. A deceptive tactic is simply an acceptable part of the game.

Second, if the legal ethics codes are considered to be part of the rules of the game for the legal professional, then we have seen that they permit a certain amount of deception, consistent with acceptable negotiation theory and principles. In the United States, for example, Rule 4.1 of the ABA Model Rules of Professional Conduct has withstood over twenty years of debate and criticism regarding its apparent support for certain perceived deception in negotiations.<sup>1008</sup> It appears that even the drafters of Rule 4.1, when referring to ‘generally accepted conventions in negotiation’,<sup>1009</sup> recognize that there are certain understood and acceptable steps to the negotiation process, such as history of offers, puffing, and certain exaggeration, that are normal. Furthermore, scholars provided insight that the drafters of the ABA Model Rules most likely realized that words alone are insufficient to impact behaviour and that imposing additional rules would only be another bargaining chip under the current legal culture.<sup>1010</sup>

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above n 96, 16-20); however, such views are also disputed, especially in more competitive markets such as commercial negotiations and some international trade negotiations.

<sup>1007</sup> Shell, above n 227, 65-69.

<sup>1008</sup> Pounds, above n 1003, 189, 195-196 (more recently, modifications to Rule 4.1 were considered at the Ethics 2000, but not adopted).

<sup>1009</sup> *Model Rules of Professional Conduct*, above n 293, Rule 4.1.

<sup>1010</sup> Pounds, above n 1003, 195-196. See also *Discussion Paper 62*, above n 560, 7-9.

Similarly, in Australia, Section 52 of the *Trade Practices Act 1974* also allows for certain levels of deception, such as opinions that might inadvertently turn out to be false and subjective assessments of products and services.<sup>1011</sup> While s 52 imposes a standard of proof lower than the ‘reasonable person’ standard, it nonetheless appears to allow for shades of deception.<sup>1012</sup>

Finally, practitioners recognize that deception and some forms of lying are an inherent part of negotiations, whether they are mediated negotiations or those conducted between the parties themselves. As such, no amount of regulation will completely eliminate its use. The examples of mediation are used here because the mediation process is essentially facilitated negotiations and thus these examples serve to illustrate the extent to which negotiation behaviour permeates other areas of the lawyer’s role.<sup>1013</sup> For example, Cooley argues that a mediator can end up being one of the most ardent users of deceptive tactics in order to manipulate information for the benefit of the parties, especially in caucused mediations.<sup>1014</sup> Furthermore, as the ‘chief information officer’ of the negotiation, a mediator is in a unique and powerful position to control the flow of information, the content, the framing of information, and engaging in his/her own set of tactics quite apart from those used by the parties.<sup>1015</sup> Even if additional rules were implemented to impose candour, Cooley argues that the rules ‘must be compatible with the game’s nature and purpose...must

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<sup>1011</sup> Pengilley, above n 576, 114.

<sup>1012</sup> Pengilley, above n 576, 113-117.

<sup>1013</sup> See, eg, Laurence Boulle, *Mediation Skills and Techniques* (2001); Laurence Boulle, *Mediation: Principles, Process, Practice* (1996) (defining ‘mediation’ as “all forms of decision-making in which the parties concerned are assisted by someone external to the dispute, the mediator, who cannot make binding decisions for them but can assist their decision-making in various ways”)

<sup>1014</sup> Cooley, above n 27, 264-266.

<sup>1015</sup> Cooley, above n 27, 264-266; See also Christopher M. Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (1986) 269 (“[t]he ability to control, manipulate, suppress, or enhance data, or to initiate entirely new information, gives the mediator an inordinate level of influence over the parties.”).



not significantly interfere with the means by which the players can accomplish the game's purpose [i.e., to resolve conflict]...must be comprehensible, reasonable, and fair... [and they] must be capable of compliance by all the game's players in all situations.'<sup>1016</sup> This seems a high bar to place on imposing truthfulness in negotiations.

In brief, the second plausible reason for lack of reform is that negotiation is widely understood to be a game where certain accepted and tacitly agreed-upon 'rules' apply. Part of those unspoken rules of the bargaining game is that tactics such as deception, puffing, and exaggeration are normal and not to be taken at face value. In fact, they are sometimes considered efficient to the extent that parties expect them and the transaction costs are likely built-in to the negotiation. If this is the prevailing view in society, it seems implausible to impose honesty by lawyers in a process that, by its very nature, appears to demand dishonesty in order to succeed.

A third reason for lack of effective reform in this area, particularly in the United States, appears to be due to the American Bar Association's <sup>1017</sup> reluctance or failure to see that there is an issue with regards to lawyers' deceptive behaviour in negotiation. There is a high degree of consensus among legal scholars that the ABA's failure to recognise key issues, including lawyer deception in negotiation, and its failure to act on them, is foundational to the problems plaguing the U.S. legal

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<sup>1016</sup> Cooley, above n 27, 274-277.

<sup>1017</sup> The term 'Bar' in this chapter is used to mean the bar associations of each country and legal jurisdiction responsible for regulating its members and their conduct under various rules and professional ethics codes. In this case, I am specifically referring to the American Bar Association since it appears to recognise negotiation and deceptive behaviour in negotiations in line with general conventions of negotiation.

profession today.<sup>1018</sup> Some argue that the ABA appears to have gone even further by actually advocating for greater leniency in allowing some level of deception in negotiation.<sup>1019</sup> This is primarily in the form of imposing a ‘materiality’ requirement on the facts or law stated to induce or be considered deceptive or fraudulent. By this I mean that the ABA legal ethics rules generally refer to lawyers not being deceptive about ‘material facts or law’ rather than requiring a blanket prohibition on deception of *all* facts or law. However, at least one legal scholar in the United States believes the ABA has reviewed the issue of lawyer deception in negotiation and has taken appropriate action given an understanding of human nature, the negotiation process, and what the ABA and state bar associations can effectively control.<sup>1020</sup>

In Australia, even though commercial and consumer regulation such as Australia’s *Trade Practice Act 1974* appears to be aimed at the Australian legal profession,<sup>1021</sup> the profession itself does not appear to readily recognise its applicability to their members. However, as stated earlier in this chapter, the Australian Competition and Consumer Commission consider the *Trade Practices Act* as applicable to all professions, including the legal profession.

A fourth interrelated reason for lack of reform on this issue is the largely self-regulated nature of the legal profession, which is more likely to act in accordance with

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<sup>1018</sup> Lowenthal, above n 28, 411; Loder, above n 533, 45; Wetlaufer, above n 31, 1219; Rubin, above n 69, 577; Deborah L Rhode, ‘Law, Lawyers and the Pursuit of Justice’ (2002) 70 *Fordham Law Review* 1543, 1556-1559.

<sup>1019</sup> Thurman, above n 148, 103-104.

<sup>1020</sup> White, above n 60, 927-931 (discussing the possible issues that the drafters of the American Bar Association Model Rules may have considered in determining the difficulty of imposing ethical norms on negotiation). This discussion does not appear to be as robust in Australia.

<sup>1021</sup> Pengilly, above n 576, 113-129; See also *Study of the Professions – legal: Summary of Final Report*, above n 925, 7 (recommending that the Act apply equally to legal professionals).

its own best interests.<sup>1022</sup> One of the common features of a predominantly self-regulated model is a profit-motivated enterprise and a role-morality ethic that many credit as being the reason why lawyers potentially act outside the bounds of society's expectations of acceptable behaviour. The role-morality ethic of lawyers allows them to act in accordance with the best interests of their clients and the legal profession regardless of whether such conduct may be inconsistent with how society expects lawyers to behave. Any external regulation which would negatively impact the profession would likely not be imposed or accepted. This is even more so in the case of imposing certain core values, such as honesty in negotiation. In addition, the profession may not see the issue of deception in negotiation as a serious enough issue to warrant reformatory action. For example, the lack of ethics violation cases in Queensland stemming from prohibited conduct in negotiation would seem to allude to the possibility that, at least in Queensland, the issue of lawyer deception in negotiation is isolated or non-existent and does not warrant any regulatory controls.<sup>1023</sup>

A fifth plausible reason for lack of reform in the area of lawyer deception in negotiation is that clients who expect a certain amount of zealous advocacy from their lawyers are not likely to complain if their lawyer 'wins' the case and protects or maximises the client's interest, even if the lawyer engaged in deceptive conduct. Many such clients, if they are happy with the outcome, are likely to praise the result rather than admonish the potentially deceptive tactics used to gain a favourable outcome. Another potential scenario is that because the use of certain

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<sup>1022</sup> See, eg, Parker and Sampford, above n 200. Note: The Queensland legal system discussed in Chapter 4 is an example of a system that is currently more co-regulated with the intervention of other professional and governmental bodies.

<sup>1023</sup> See Chapter 6 for a more detailed discussion of the analysis of legal ethics violation cases in Queensland for deceptive or misleading conduct.

misrepresentations and deceptions is widely accepted in negotiations and because clients themselves may engage in such behaviour on a regular basis, they are less likely to consider the deceptive behaviour of their own lawyer, albeit against an opponent, as immoral or unacceptable.<sup>1024</sup>

A sixth potential reason for lack of reform in this area is the nature of human beings as it relates to lying and the effort it might take to change engrained behaviours in the social fabric. It could be argued that lying is as old as time. It is part of the fabric of human nature. From the time of the Ten Commandments, where lying was strictly forbidden,<sup>1025</sup> society has ‘evolved’ to accept that there may be times when lying is necessary and the best strategy, such as when attempting to avoid hurting other people’s feelings or when it might cause harm. Society even appears to tolerate outright lying in certain circumstances.<sup>1026</sup>

In 1894, John Locke recognized this fascinating aspect of human nature, stating ‘[i]t is evident how men love to deceive and be deceived since rhetoric, that powerful instrument of error and deceit, has its established professors, is publicly taught, and has always been had in good reputation; ...men find pleasure to be deceived.’<sup>1027</sup>

In 1968, Arendt argued that ‘our ability to lie – but not necessarily our ability to tell the truth – belongs among the few obvious demonstrable data that confirm

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<sup>1024</sup> Note: This possible reason for lack of reform might conflict with the consumer studies discussed earlier; however, at this time, there do not appear to be studies that report on the correlation between a client being happy with the results of their case and therefore having a positive perception of their legal practitioner or the converse. As such, this paragraph provides only one of several possible explanations for the lack of reform on the issue of lawyers’ deceptive conduct in negotiation.

<sup>1025</sup> Most commonly recognized as the 9<sup>th</sup> Commandment - Exodus 20:16 *"Thou shalt not bear false witness against thy neighbour."*

<sup>1026</sup> Cooley, above n 27, 263.

<sup>1027</sup> Barnes, above n 7, 3.

human freedom.’<sup>1028</sup> Scholars argued that lying is one of humankind’s distinguishing features from the animal kingdom. The ability to tell a lie and to do so effectively became the hallmark of human creativity and freedom, a God-given right as argued by some.<sup>1029</sup>

In 1983, Barwise and Perry affirmed this by basically arguing that it is only because people violate the conventions of language (i.e., by lying) that we are able to ‘recognize truth as uniformity across certain utterance situations.’<sup>1030</sup> They seem to argue that it is because people lie that we are able to tell what is considered a standard of truth; if they did not, then we would ‘never notice truth as a property of some utterances and not others’.<sup>1031</sup>

Scholars may justify lying by stating that it was essential to human creativity and freedom. However, social psychology confirms the propensity of people to lie in a variety of circumstances simply because the heuristics and systematic biases inherent in human nature increase the probability of lying.<sup>1032</sup> For example, it is natural for people to: a) believe our own cause is just over the other party’s saying the same; b) to assume the worse with regards to our adversary’s motives, character, and conduct yet assume the best with respect to our own; c) to accept as sufficient the justifications we give to ourselves regarding the lies we tell but to devalue the justification of others; d) to believe that the lies we tell are better justified than those told by our opponent; and e) to devalue an offer or opinion of another party without

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<sup>1028</sup> Barnes, above n 7, 3 (discussing Arendt (1968: 250)).

<sup>1029</sup> Ibid.

<sup>1030</sup> Barnes, above n 7, 3 (discussing Barwise and Perry (1983: 18)).

<sup>1031</sup> Barnes, above n 7, 3 (discussing Barwise and Perry (1983: 18)).

<sup>1032</sup> Wetlaufer, above n 31, 1232; See also Korobkin and Guthrie, above n 79, 795; Chris Guthrie ‘Insights from Cognitive Psychology’ (2004) 54 *Journal of Legal Education* 42.

any reason, simply because they come from someone else.<sup>1033</sup> Such inherent human biases combined with a competitive negotiation environment only increase the probability that people will lie in negotiations.<sup>1034</sup>

Additional evidence of the nature of human behaviour with respect to lying can be found simply in the engrained workings of modern society. Today, a global economy, advanced technology, and the economic rise of once third-world economies have created increased competition. Competition, by nature, involves the importance and pursuit of ‘winning’.<sup>1035</sup> Competitors generally engage in competitive, win-lose, fixed pie thinking.<sup>1036</sup> As a result, parties in competition will tend to use distributive bargaining tactics to claim the maximum value from a presumably fixed-pie. Such distributive bargaining tactics are, by their very nature, not cooperative. Lying is one such tactic and can be used strategically in an attempt to gain maximum advantage in a negotiation. This appears even truer for legal professionals in an adversarial system, whose careers depend on effective negotiations to deliver results.<sup>1037</sup>

The use of deception is also engrained into society by the legal professionals’ clients who demand a certain level of success from their lawyers. Clients have come to expect the lawyer to serve as advocate and protector of the client’s interests as affirmed by the lawyers’ tenets of duty, loyalty, and zealous representation of their clients.<sup>1038</sup> These professional tenants influence the negotiation behaviour of legal

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<sup>1033</sup> Wetlaufer, above n 31, 1232; Korobkin and Guthrie, above n 79, 795; Guthrie, above n 1032, 42 (discussing the impact of heuristics and biases in negotiations).

<sup>1034</sup> Wetlaufer, above n 31, 1232 (citing Sisela Bok as stating that “[b]ias skews all judgment, but never more so than in the search for good reasons to deceive.” Sisela Bok, *Lying: Moral Choices in Public and Private Life* 26 (1978)).

<sup>1035</sup> Pounds, above n 1003, 187.

<sup>1036</sup> Win-lose and fixed-pie mentality are generally associated with distributive bargaining.

<sup>1037</sup> Wetlaufer, above n 31, 1220.

<sup>1038</sup> Pounds, above n 1003, 182; see also Wetlaufer, above n 31, 1220 and 1272 (discussing the nature of lying as used by legal professions under the guise of the duty of loyalty and zealous representation).

professionals in such a way that lawyers may use deception to obtain the best possible outcome for their clients. The legal system expects this and so do clients.

However, some argue that the duty of loyalty and zealous representation does not logically translate into an excuse to engage in deceptive tactics that might reflect poorly on the lawyer (by committing ‘bad acts’), the legal profession, or the public’s perception of the integrity of the legal profession. The argument appears to be that the legal practitioner could condition an offer of representation by stating that the lawyer will not commit ethically improper acts.<sup>1039</sup> This might be a challenge because it requires a change in engrained behaviours. Lawyers and the public have been trained on and come to accept certain negotiation practices as permissible, including the use of some deception in negotiation.<sup>1040</sup> As social scientists have repeatedly observed, changing such engrained behaviours is fundamentally hard given natural human tendencies even if you are trying to make a ‘discerning choice’.<sup>1041</sup> In addition, controlling such practices may have an impact on expectations of justice or on durable agreements long considered the hallmarks of effectively negotiated agreements.

A seventh and perhaps most important consideration for lack of reform in the area of lawyer deception in negotiation are the transaction costs of imposing candour in negotiation. While there may be potential benefits of imposing laws on candour in negotiations, there are likely to be costs which might outweigh the potential benefits. First, the legal system is not without its limitations. It has contextual constraints, time constraints and is subject to resource and cost constraints just like any other business. For example, law deals with attempting to reconstruct past events, not so much in

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<sup>1039</sup> Wetlaufer, above n 31, 1255.

<sup>1040</sup> Cooley, above n 27, 268.

<sup>1041</sup> Pounds, above n 1003, 224, n 252.

‘finding facts’ but in attempting to re-determine what might have happened based on many peoples’ perspective of the events.<sup>1042</sup> Because law, and therefore legal professionals, become a ‘player’ *after* the game has already started, there is possibility for error on many levels.<sup>1043</sup> In addition, law must account for transaction costs associated with providing the service of ‘justice’. Due to these inherent limitations of the adversarial system, it is argued that law might have to accept some forms of deceptions, such as those which will not affect the overall outcome of the case, impose an insurmountable burden of proof, or those which are undetectable.<sup>1044</sup> In an effort to meet the goals of closure to disputes, access to courts, speedy trials, administration of justice, and remedies, the legal system must weigh the transaction costs of doing justice with the costs of actually uncovering the truth.

Furthermore, while imposing candour in negotiations is an admirable goal, even proponents recognize that the transactions costs associated with this would be the biggest hurdle. A higher standard might become ‘one more weapon in the adversarial arsenal, with each side threatening to bring ethics violation charges against the other.’<sup>1045</sup> This would result in an increase in overall transaction costs for handling the case.

Finally, the eighth reason why each of the various solutions proposed to date have not been implemented or adopted is because they appear to be an attack on the legal profession and reinforce a litany of reasons why the profession is failing. This is likely to put the legal profession on the defensive where the profession and its

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<sup>1042</sup> Wetlaufer, above n 31, 1235.

<sup>1043</sup> Ibid.

<sup>1044</sup> Ibid.

<sup>1045</sup> Pounds, above n 1003, 195 (citing Robert H Mnookin et al., *Beyond Winning: Negotiating to Create Value in Deals and Disputes* (2000) 293-294).



members will either act defensively and try to further hold on to their current position and justify it or not act at all.

From the perspective of the legal profession, one could argue that each of the three main solutions proposed to date are isolated solutions, addressing only one aspect of a more complex problem involving multiple stakeholders. Attempting to adopt one particular solution over another would be costly and potentially ineffective, especially since decision making theories seem to suggest that there is insufficient deterrence for lawyers to *not* lie in negotiations.<sup>1046</sup> The solutions proposed to date also lack sufficient empirical evidence to ensure success or viability on the one hand and appear to be too broad and costly on the other. Therefore, both a new perspective and an integrated approach are needed to address this timely issue impacting the legal profession, both internally among legal practitioners and externally in the eyes of the public whom the legal profession is meant to serve. This integrated path to policy reform is discussed further in Chapter 7.

## **6.7 CHAPTER CONCLUSION**

This chapter summarised the critical findings of the research questions established in Chapter 1 and identified the opportunity for professional reform recommendations to address the issue of lawyers' use of deception in negotiation.

The results of the first research question confirm that lawyers do engage in deceptive tactics, even in negotiation, regardless of whether the legal ethics code condemns all forms of deception. The results of the second research question, which consisted of a comparative study of legal ethics codes, revealed that the legal ethics

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<sup>1046</sup> See Chapter 2, section 2.3.7 (Decision Making Theories Affecting Legal Negotiation); See also Kahneman and Tversky, above n 265, 263-291; Guthrie, above n 505, 163; Rachlinski, above n 269, 113 (noting that “[e]xpected utility theory predicts that people make either risk-averse or risk-neutral choices.”).

codes of the selected group of common law jurisdictions do not consistently address the issue of deception in negotiation and fail to provide explicit guidance on how lawyers ought to behave in negotiations. The results of the third research question, which consisted of an original study of the Queensland ethics violation cases alleging misleading or deceptive conduct, confirm that deception in negotiation is not as effectively regulated as other violations of the legal ethics code. Finally, the findings of numerous studies on lawyers and the legal profession provide a compelling case for reviewing the impact of the legal ethics codes on influencing the behaviour of legal professionals.

The collective findings from the three primary research questions and the resulting insights as discussed in this chapter establish a compelling argument for policy reforms.<sup>1047</sup> The issue can no longer be ignored. The consumer studies discussed in this chapter appear to indicate that the problem lies with *how* some lawyers behave and conduct themselves in carrying out their responsibilities on a daily basis. As the Gallop poll and ABA consumer studies are primarily from the United States, and similar statistical data is not available for Australian lawyers, the comments are directed specifically to the behaviour and tactics used by some percentage of US lawyers. Since negotiation is a primary means by which lawyers carry out their responsibilities, the way lawyers negotiate and the tactics and behaviours they display (because they do so at every level of the legal process) are sufficient enough reason to look at serious policy reforms in this area. If lawyers are deceptive in negotiations, the profession will be considered deceptive and lacking

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<sup>1047</sup> See e.g. Kirby, above n 677 (discussing Dean Anthony Kronman's book *The Lost Lawyer: Failing Ideals of the Legal Profession* and its impact and relevance to the Australian legal profession, including proposals for reforms in the areas of legal ethics, professional reform, and legal ethics education).

integrity. This will be directly reflected in how lawyers and the profession are viewed in the eyes of the public it is entrusted to serve. Regardless of whether the issue of lawyer deception is considered a minor or major issue, there is hope through implementing strategic, incremental changes that can have a positive, lasting impact.

Reforms aimed at how lawyers negotiate and minimising the use of tactics or behaviours which are considered deceptive or misleading is a positive step towards managing negative perceptions and improving the effectiveness of legal professionals in serving their clients in the interests of justice and public welfare. To the extent that policy reforms can influence the negotiation behaviours of lawyers toward the use of more ethical, honest negotiation approaches as opposed to adopting ‘generally accepted negotiation conventions’ that consist of potentially deceptive negotiation behaviour is the direct extent to which negative perceptions of the legal profession may be minimized by the profession and the public. The next chapter outlines a tri-partite, integrated policy reforms framework and discusses the aims, benefits, and methodology for implementing the proposed reforms.

## CHAPTER 7 – IMPLICATIONS FOR LAW REFORM

*‘Any occupation or profession is unworthy if it requires of us that we do as a functionary what we would be ashamed to do as a private person.’*

~ Sydney J Harris<sup>1048</sup>

This chapter focuses on the potential for integrated, systematic, and creative legal and non-legal policy reforms to address the issues discussed in this thesis. This chapter develops a tripartite<sup>1049</sup> response approach to this cross-jurisdictional, multidisciplinary issue. It offers recommendations for several reform proposals along with a discussion of benefits and risks. In addition, this chapter discusses cross-disciplinary views of how to engage effective and lasting behavioural changes in order to implement the policy reform proposals discussed herein. Finally, this chapter concludes with a call to action for the legal profession to finally recognise that the profession has the opportunity to redefine itself in terms of the research questions posed in this thesis and must now take solid *forward-thinking* steps to address the issue of lawyer deception in negotiation.

### 7.1 INTRODUCTION

Chapter 2 provided an extensive review of literature in the areas relevant to the research questions posed in this thesis, including areas of legal ethics and negotiation. Chapter 6 highlighted several solutions that have been previously introduced to

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<sup>1048</sup> D’Amato and Eberle, above n 174, 762 (quoting Sydney J. Harris). See also BrainyQuote, *Sydney J. Harris Quotes* <[http://www.brainyquote.com/quotes/authors/s/sydney\\_j\\_harris.html](http://www.brainyquote.com/quotes/authors/s/sydney_j_harris.html)> at 9 August 2010.

<sup>1049</sup> The term is adopted from Professor Charles Sampford in Stephen Parker and Charles Sampford, *Legal Ethics and Legal Practice: Contemporary Issues* (1995). Sampford talks about an integrated three-part solution to multi-disciplinary, complex issues such as those presented in this thesis and, thus, the term is appropriate. Synonymous terms include: ‘trilateral’ or ‘three-way’.

resolve the issue of lawyer deception in negotiation and the reasons why these proposals have not, to date, been adopted. These proposals included the modifying the current legal ethics code, adopting an entirely new model of legal ethics,<sup>1050</sup> and maintaining the status quo.<sup>1051</sup> These various suggestions point to the difficulty in addressing the issue of ethics, namely that irrespective of whether practitioners and scholars agree that the current legal ethics codes may be flawed,<sup>1052</sup> they appear to disagree on exactly what to do about it and how to execute that change.<sup>1053</sup> This leaves the profession in a predicament because there are essentially two diametrically opposed views along a continuum of possible solutions.

Along one end of the solutions continuum is the prevailing view to maintain the status quo by keeping the adversarial-type ethic that appears to serve as the hallmark and foundation of the common-law justice system. The current legal ethics model is generally described as the standard conception model consisting of two primary elements forming the core of the role-morality of lawyers. The first element is called the ‘principle of partisanship’ and the second element is described as the ‘principle of non-accountability’.<sup>1054</sup> The partisanship principle is one of the hallmarks of the legal system in terms of zealous representation of clients. The ramification of the partisanship principle is that it creates an impression (often

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<sup>1050</sup> Note: I am referring primarily to the literature from the United States regarding the American Bar Association Model Rules of Professional Conduct because of the significant debate surrounding Rule 4.1 and negotiations. While the same issues may not apply to the other common-law jurisdictions, the concern that the legal ethics code based on an adversarial system is flawed is applicable to these same jurisdictions and that is the focus of this section.

<sup>1051</sup> See Chapter 6, Section 6.6 (Failure of Prior Proposed Reforms and A Call to Action) for more information.

<sup>1052</sup> Rhode, above n 151, 0-21 (“...bar ethical codes are not an adequate source of guidance....end up reflecting too high a level of abstraction and too low a common denominator of conduct.”).

<sup>1053</sup> Rhode, above n 975, 867 (“...bar’s prevailing ethics norms are fundamentally flawed and their inadequacies carry a substantial cost for both the profession and the public. Where the commentators differ, both with Simon and each other, is on plausible prescriptions...”)

<sup>1054</sup> Parker and Evans, above n 156, 21-23; Luban, above n 157. See also Chapter 2 (Review of Literature) for a more detailed discussion of the standard conception model of legal ethics.

negative) in the minds of clients and the public (especially those who feel they have not received justice or their interests have been compromised) that lawyers are amoral, which is commonly perceived as lawyers not being accountable for their actions.<sup>1055</sup> This triggers the non-accountability principle. While a lawyer is meant to serve all equally, a lack of integrity in the way the lawyer carries out his/her task (e.g., by engaging in deceptive conduct in negotiations) leads scholars and practitioners to argue that the current legal ethics model is flawed and irreprehensible in contravention of the public interest.<sup>1056</sup> Scholars acknowledge the limitations of partisan advocacy yet also argue that a totally non-partisan system is likely impossible since those disputes which cannot be resolved by negotiation may end up in court, where partisan advocacy prevails.<sup>1057</sup> It seems that the legal system which appears to receive so much criticism from the public and the profession is the same system which places value on client loyalty, rewards zealous representation of the client's legitimate goals within the bounds of the law, advocates without discrimination, offers representation regardless of a client's financial means, and strives to set aside personal loyalties, values, and morals when representing a client.<sup>1058</sup>

Despite these virtues of the standard conception model (adversarial ethic), the ambivalence about the legal system and its practitioners appears to come not from the adversarial ethic itself but from the lack of fulfilment of the highest standards that the standard conception model is meant to signify within the context of the fulfilment of

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<sup>1055</sup> Note: I would argue that it is unrealistic to expect that lawyers are completely not aware of their own personal morals and values in the course of representation or that these personal beliefs do not impact their representation. The key here is that without specific and practical tools of dealing with the possible ethical conflicts, a lawyer might revert to a personal ethic that is in direct conflict with the lawyer's role as an officer of the court and defender of public interest.

<sup>1056</sup> Whitton, above n 603; Rhode, above n 975, 867.

<sup>1057</sup> Mize, above n 66, 248.

<sup>1058</sup> Parker and Evans, above n 156, 16-17; Rhode, above n 151, 15.

the promise of law. By this I mean that the most ethical interpretation associated with the principle of partisanship is a client's ability to have his/her interests heard and accounted for by a legal professional versed in representing those legitimate interests in a forum of ordered dispute resolution. In addition, the most respectable view associated with the principle of non-accountability is *not* that the lawyer is completely devoid of good morals or values and thus is amoral. Instead, in this case, perhaps a more reasonable interpretation is that the lawyer is expected and bound by the legal ethics code to represent equally without discrimination or judgment and not allow conflicting personal values to infringe upon the client's legitimate<sup>1059</sup> representational goals. The erosion of that high standard of professionalism is reflected, in part, in the way lawyers negotiate, the use of potentially deceptive behaviours in negotiations, and a lack of clarity on the standards that apply to a lawyer's now most prominent function – negotiators of deals, information, and agreements.<sup>1060</sup> These three factors affect the extent to which the legal ethics codes can be successful in addressing the issues related to lawyer deception in negotiation.

On the other hand of the solutions continuum is a recommendation to adopt an entirely new legal ethics model.<sup>1061</sup> For example, Simon would argue for a legal ethic based on contextualism.<sup>1062</sup> Simon argues that lawyers should abandon the dominant

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<sup>1059</sup> By this I mean requests and objectives which are within the bounds of the law and consistent with the role of the lawyer as an officer of the court.

<sup>1060</sup> Eyster, above n 977, 756-757 ("...the reasons we have been unsuccessful in achieving a satisfactory negotiation ethic go to the heart of our system of legal education and our related beliefs about professionalism."); Rhode, above n 151, 210; Davis, above n 171, 347 (discussing how professionalism is a contract implied-in-fact with the public and therefore includes moral obligations that must be honoured).

<sup>1061</sup> See Chapter 6, Section 6.6 (Failure of Prior Proposed Reforms and A Call to Action) for more information.

<sup>1062</sup> See generally Simon, above n 191. See also Thurman, above n 148, 103 (discussion situation ethics and arguing against it in favour of greater veracity by lawyers in negotiation and in all their dealings).

view (standard conception) that allows lawyers to pursue any justifiable and legal goals of the client in favour of a model of legal ethics called ‘contextualism’.<sup>1063</sup> Under this approach, ‘lawyer should take such action as, considering the relevant circumstances of the particular case, seem likely to promote justice’.<sup>1064</sup> This means that, for example, in the context of negotiations, a lawyer would ‘factor into her decision-making and conduct her personal values and professional ethics’<sup>1065</sup> and not be constrained by or ‘take [ ] refuge behind categorical rules of zeal, confidentiality, and moral neutrality toward the client's ends.’<sup>1066</sup>

For example, where a lawyer is representing a poor or powerless client against a more formidable, forceful and powerful adversary, Simon suggests that the lawyer should not be constrained by rules of ethics and should try and achieve a fair and just result, even if that means working with and assisting the adversary.<sup>1067</sup> Eyster appears to agree with Simon to the extent that ‘...attorneys should indeed be governed in their decisions and actions by their moral beliefs.’<sup>1068</sup> In addition, both Luban and Simon agree on the basic principle of advocating for ‘ethically ambitious or high-commitment lawyering’.<sup>1069</sup>

However, there is danger in adopting Simon’s approach wholesale. One troublesome aspect of Simon’s proposal is the potential for total disregard of the legal

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<sup>1063</sup> Simon, above n 191, 109.

<sup>1064</sup> Simon, above n 191, 5-9; See also William H Simon, ‘Ethical Discretion in Lawyering’ (1988) 101 *Harvard Law Review* 1083, 1090.

<sup>1065</sup> Eyster, above n 977, 780 (citing Simon, above n 1064, 1113-1119). Eyster goes so far as to state that while she was initially shocked by Simon’s proposal, she now agrees that “...attorneys should indeed be governed in their decisions and actions by their moral beliefs.” (Eyster at 780). This is troubling in that it assumes that values such as fairness and justice are not pursued under the current adversarial or standard conception ethic.

<sup>1066</sup> Luban, above n 1069, 885-888 (critiquing Simon, above n 191).

<sup>1067</sup> Eyster, above n 977, 780 n 90 and 91 (citing Simon, above n 1064, 1105-1106, 1098-1099).

<sup>1068</sup> Eyster, above n 977, 780.

<sup>1069</sup> Simon, above n 191 9; David Luban, ‘Reason and Passion in Legal Ethics’ (1999) 51 *Stanford Law Review* 873, 885-888 (critiquing Simon, above n 191).



rules which are meant to set the boundaries between professional duties and personal beliefs. Another area of concern is the extent to which an individual lawyer's personal judgement is consistent with or in contravention of definitions of justice. For example, 'justice' may mean one thing to a client, another to the lawyer, and yet have another, different meaning within the justice system. By allowing or advocating for potentially unfettered or unreasoned personal judgment in the context of executing a public servant role, the lawyer acting under contextualism (situation ethics) may undermine more than help the client.

Further, practitioners have criticized Simon's preferred theory of legal ethics as far reaching, lacking in statistical data, and devoid of 'detailed anthropological studies of particular lawyerly cultures' that prove the malaise and collusion that Simon believes is plaguing the profession.<sup>1070</sup> Perhaps a central concern is expressed by another prominent legal ethics theorist, that Simon's proposal of contextualism is 'a law-centered theory... [t]he values he wants lawyers to further are legal values; the justice he means them to pursue is legal justice'.<sup>1071</sup> The concern appears to be that Simon's contextualism essentially attempts to dilute the adversarial nature of the current legal ethics model in favour of Simon's own view of how values such as justice and fairness can be achieved, albeit still within the legalist structure of the current system.

Luban argues that Simon's approach is still about 'legal judgments grounded in the methods and sources of authority of the professional culture', excluding

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<sup>1070</sup> Luban, above n 1069, 885-888 (critiquing Simon, above n 191); Smith, above n 976, 2-4.

<sup>1071</sup> Ibid.

considerations of ordinary morality.<sup>1072</sup> This is in direct contrast with more morality-centred legal ethics models.<sup>1073</sup> Eyster appears to recognise this concern and states that while personal beliefs and judgement should be part of a lawyer's decision-making process, discretion, in order to be exercised responsibly, must be through the development of moral judgment within the profession and that the profession must accept moral judgment as a norm, something that appears to be highly lacking in the current environment.<sup>1074</sup>

In summary, adopting one approach (amend the legal ethics code) or the other (adopt a new legal ethics code) is an on-going debate that has been unresolved over the better part of the last twenty years. Regardless of whether the majority of the profession and practitioners agree that the current legal ethics model is outdated or too adversarial, the fact remains that there is no growing consensus on how to address this aspect of the profession's discontent.<sup>1075</sup> Furthermore, adopting either approach as the single solution to the issue of lawyer deception in negotiation seems to be a classic case of trying to solve an issue within the inherent constraints of the profession's expertise. As paraphrased from Einstein, solutions to problems cannot be approached from the same consciousness that created those problems else insanity ensues.<sup>1076</sup> The issue of lawyer deception in negotiation is a complex, multi-disciplinary issue involving multiple stakeholders. It is an issue which cannot be resolved solely by the profession.

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<sup>1072</sup> Ibid. Luban argues that this approach is in direct contrast to morality-centred theories of legal ethics. See also Luban, above n 157 (advocating for a more morality-centred view of legal ethics).

<sup>1073</sup> See, eg, Luban, above n 157 (advocating for a more morality-centred view of legal ethics).

<sup>1074</sup> Eyster, above n 977, 780-781.

<sup>1075</sup> Rhode, above n 975, 867-872.

<sup>1076</sup> Thinkexist.com, *Albert Einstein quotes* (2009) <[http://thinkexist.com/quotes/albert\\_einstein/](http://thinkexist.com/quotes/albert_einstein/)> at 9 August 2010. This is paraphrased from two well-known quotes by Einstein: "No problem can be solved from the same level of consciousness that created it." The second quote is: "Insanity: doing the same thing over and over again and expecting different results."

The solution to the issues identified in this thesis as related to lawyer deception in negotiation requires an alternative perspective. This includes a multidisciplinary approach which aims to take small, measurable steps utilising varied expertise targeted towards the development of incremental, progressive changes using a different mindset. This can be achieved through the policy reform proposals recommended and discussed in this chapter.

The tripartite approach of ethical standard setting, legal regulation modifications and institutional design reform, discussed in the next section, provides an opportunity for all key stakeholders to be participants towards progressive evolution of the profession, especially in addressing the issue of lawyer deception in negotiations. This, in turn, will create a positive impact across all areas of a lawyer's daily practice. The tripartite framework adopted here was initially proposed by Professor Sampford in the context of business ethics and public sector ethics issues.<sup>1077</sup> This tripartite combination of ethical standard setting, legal regulation and institutional design reform has also been called an 'ethics regime',<sup>1078</sup> an 'ethics infrastructure',<sup>1079</sup> and an 'integrity system'<sup>1080</sup> by various noted authors and

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<sup>1077</sup> Parker and Sampford, above n 200, 11-12 (discussing that many of the "key problems faced by the West in the late twentieth century are institutional problems" and that answers to many of the problems require a tripartite response that consists of a combination of: 1) legal reform; 2) ethical standard setting; and 3) institutional design). As with any major problem, an integrated solution that invites and involves the various stakeholders is an important and necessary element of success. See also the various publications of Professor Sampford in relation to business ethics and public sector ethics: Charles Sampford, 'Law, Institutions and the Public Private Divide' (1992) *Federal Law Review* 20, 185; Charles Sampford and David Wood, 'The Future of Business Ethics: Legal Regulation, Ethical Standard Setting and Institutional Design' (1992) *Griffith Law Review* 1, 56; Charles Sampford, 'Institutionalising Public Sector Ethics' in Noel Preston (ed), *Ethics for the Public Sector: Education and Training* (1994).

<sup>1078</sup> Noel Preston, Charles Sampford and Carmel Connors, *Encouraging Ethics and Challenging Corruption: Reforming Governance in Public Institutions* (2002) 7 (citing Sampford 1994a)

<sup>1079</sup> Preston, Sampford, and Connors, above n 1078, 7, 9-10 (citing PUMA/OECD 1997: 12); Organisation for Economic Co-Operation and Development, *Proceedings of the 1997 OECD Symposium on Ethics in the Public Sector* (1999) 69-70  
<<http://www.oecd.org/dataoecd/40/15/2093526.pdf>> at 9 August 2010 (discussing the definition of an

international agencies. The goal is to present the policy reform proposals with the recommendation that an *integrated solution* is required, not just reforming one aspect in hopes that it will sufficiently and fully address the problems discussed in this thesis.

## **7.2 POLICY REFORM PROPOSALS - A TRIPARTITE RESPONSE**

The tripartite response to the issue of deception in negotiation involves an integrated set of strategic policy reforms, each discussed in separate sections below. These reform proposals are centred on legal regulation reforms, reforms in ethical standard setting, and institutional design reforms. By integrated, I mean that the reform proposals under each of the three areas are meant to complement each other so as to achieve a cohesive, consistent response to the issues discussed in this thesis.

Collectively implemented, the following are the principal goals of these recommended reforms:

- to consider the issue from a multi-faceted, integrated approach which recognises that a lasting solution must have the participation and cooperation of all key stakeholders;
- to encourage greater consistency and clarity in the language of legal ethics codes such that they recognises the various functions of lawyers in today's global marketplace, especially the increasingly important role of lawyer as negotiator;
- to introduce recommendations for greater education in the areas of ethics that consists of moral reasoning, greater moral analysis of legal problems

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ethics infrastructure as indicated in PUMA's 1997 report *Managing Government Ethics*, as "comprising eight key elements, two of the elements being "an effective legal framework," and "an ethics co-ordinating body.")

<sup>1080</sup> Preston, Sampford, and Connors, above n 1078, 7 (citing Transparency International 2000); Jeremy Pope, *TI Sourcebook 2000 Confronting Corruption: The Elements of a National Integrity System* (2000) <<http://www.transparency.org/publications/sourcebook>> at 9 August 2010.

and consistency of decisions between legal ethics and general morality;  
and

- to propose changes to both the legal ethics and negotiation curriculum taught at law schools so that law students who take these courses have a clearer understanding of the interdependencies between these topics and its impact on the daily tasks of legal professionals.

The reform proposals start by looking at reforms in legal regulation, then address proposed changes to ethical standard setting and conclude with suggested reforms on institutional design which frequently affect the ability to effectively implement and enforce policy choices and intended behavioural changes. Finally, a discussion and analysis of various means of implementing the recommended policy proposals demonstrates that these proposals can be successfully implemented with maximum benefit and minimum risk.

### **7.3 LEGAL REGULATION REFORMS**

As defined in Chapter 1, legal regulation is integral to regulating the conduct of members of the profession by re-enforcing existing codes of conduct and providing disincentives for engaging in poor conduct. As Preston, Sampford and Connors argue, legal regulation plays a part in an integrated system of each jurisdiction's overall governance.<sup>1081</sup> Where legal regulation is inconsistent with or in contravention of the values it is meant to serve and the means used to achieve those values, it should be amended accordingly.<sup>1082</sup>

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<sup>1081</sup> Preston, Sampford, and Connors, above n 1078, 187.

<sup>1082</sup> Ibid. See also W William Hodes, 'Truthfulness and Honesty Among American Lawyers: Perception, Reality, and the Professional Reform Initiative' (2002) 53 *South Carolina Law Review* 527, 537 ("Unless the organized bar cleans its own house, sooner or later government agencies will remove the unique measure of self-regulation granted to the legal profession and step in to clean it for us.").

One of the central questions that seem to underpin the possible lack of reform in the area of legal regulation is evidence-based conclusions of whether the legal ethics codes are really effective in providing sufficient guidance to lawyers in managing and regulating lawyer conduct.<sup>1083</sup>

Historically, lawyers received guidance on how to conduct themselves in professional settings through information ‘handed down from one generation of lawyers to another through word of mouth, law society dealings in disciplinary matters, remarks from the bench, and so on.’<sup>1084</sup> At the beginning of the 20<sup>th</sup> century, the North American legal profession formally adopted professional codes of conduct meant to provide guidance on how lawyers should behave professionally. The intent of these professional codes of conduct was to assist lawyers in engaging in a consistent and appropriate course of conduct in their daily practice. However, despite the intent of the professional codes of conduct in providing guidelines for appropriate conduct in practice, they do not appear to be the primary source that lawyers refer to when attempting to resolve ethical dilemmas.

Wilkinson, Walker and Mercer’s research initiative on this topic in Ontario, Canada seems to confirm that the majority of lawyers practicing in Ontario, Canada who participated in the study ‘demonstrate[d] a lack of reliance on professional codes for the purpose of resolving ethical issues... [and that] such codes tend[ed] to inhibit ethical deliberation by those lawyers who refer to them for assistance in solving

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Hodes was referring to the 2002 Professional Reform Initiative’s primary goal in the US to encourage honesty and truthfulness among US lawyers.

<sup>1083</sup> See, eg, Rhode, above n 151 (speaking about the American Bar Association’s *Model Rules of Professional Conduct* and perhaps also the state professional ethics codes and arguing that “bar ethical codes are not an adequate source of guidance....end up reflecting too high a level of abstraction and too low a common denominator of conduct.”).

<sup>1084</sup> Wilkinson, Walker and Mercer, above n 472, 647 (citing Loder, above n 42, 318).

specific problems.<sup>1085</sup> This view is consistent with the issues associated with disciplinary codes based on positive morality as discussed in Chapter 2.

The Ontario, Canada study, discussed in Chapter 2, is important in providing a perspective into the legal regulation reforms proposed in this section. At best, the study confirms that legal regulation and ethics codes, at least in the Ontario, Canada jurisdiction, do play a role in shaping lawyer behaviour in resolving ethical issues. At worst, it sheds light that while legal ethics codes may play an explicit or implicit role in helping lawyers resolve some ethical dilemmas, they are certainly not the main driver in ensuring an integrity-based system of lawyer conduct.

The three recommended legal regulation reform proposals presented below take these observations into account in addressing the potentially deceptive behaviour of lawyers in negotiations.

### **7.3.1 Proposal 1 – Formally Recognise Negotiation as a Process Separate from Litigation or other ADR Mechanisms**

The first legal regulation reform proposal recommends a modest clarification to the legal ethics code. As established in previous chapters, negotiation is widely recognised as the quintessential skill of an effective and successful lawyer. Also as established in previous chapters, not all lawyers are engaged in legal work, such as document preparation, that involves negotiation. As courts, judges, and clients continue to seek more non-adjudicated resolutions and agreements to their legal issues and as the legal profession becomes more global with complex, multi-party issues and deals, negotiation will continue to evolve into a dominant legal dispute resolution process and be the foundation of other alternative dispute resolution processes such as mediation and arbitration. Furthermore, a review and analysis of legal ethics codes

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<sup>1085</sup> Ibid. See Chapter 2, Section 2.5.4 (Research on Legal Ethics) for more information on this study.

undertaken in Chapter 4 indicates that, while lawyers negotiate on a daily basis, the professional bodies that regulate lawyer conduct do not necessarily regard lawyer-negotiators in the same way that they regard lawyers as mediators, arbitrators, or judges. The distinction here is critical.

One can negotiate in the sense of an action *verb*, to negotiate. However, one can also be a negotiator in the sense of the *noun*, negotiator. The legal profession, lawyers, and clients recognise that lawyers may and do negotiate; however, they do not seem to fully recognise that lawyers may *serve as* negotiators, much like lawyers serve as advocates, mediators, arbitrators, or judges at various points in their legal career.<sup>1086</sup> To date, most legal ethics codes formally recognise that there are certain rules for when a lawyer serves as an advocate, prosecutor, third-party neutral (arbitrator or mediator), or judge. This same distinction is not formally recognised when a lawyer serves as a negotiator.

This first legal regulation reform proposal is to formally recognise that a lawyer is a negotiator and to more formally recognise this function in the legal ethics codes. This requires a slight amendment to the legal ethics codes at the national and jurisdictional level. This can be most easily accomplished by adding a section to the legal ethics codes, entitled ‘Lawyer as Negotiator’ or ‘Lawyer Serving as Negotiator’.

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<sup>1086</sup> See, eg, Anthony T Kronman, ‘Living in the Law’ (1987) 43 *University of Chicago Law Review* 834, 840 (discussing the distinction of task and function between “those involvements and activities that constitute his character or personality, on the one hand, and those, on the other, that do not, between those that make someone the person he or she *is* and those one merely *has* or *does*.”) (italics in the original). See also White, above n 60, 929 (who acknowledges that the American Bar Association is finally moving in the right direction by acknowledging negotiation as a separate process). Despite White’s observation, the ABA has not fully realised their intended vision because of imbedding the role of negotiation and negotiators into one of the most controversial rules of the Model Rules of Professional Conduct, namely Rule 4.1. This is unlike the more direct and conspicuous approach taken by Canada as discussed more fully in Chapter 4. I would argue here that in the lawyer’s case, the lawyer *is* a negotiator on a daily basis and this does shape his character and personality within the legal system and affects the perception of the legal profession by the way he functions as a negotiator.



<sup>1087</sup> This is a modest change that clarifies the lawyer's role and does not run afoul of potential concerns that such an amendment would infringe on any other ethical duties. In fact, as the Ontario, Canada legal ethics code survey showed, lawyers do positively consult the professional ethics codes for clarification of their roles and obligations, even if they do not find specific guidance on a particular ethical dilemma. The benefit of this first legal regulation reform proposal is two-fold.

The first benefit of this legal regulation proposal is that it formally recognises what has been informally known by clients and the profession as a whole, that by and large, what most lawyers do consistently and continually on a daily basis is to negotiate on behalf of their clients' best interests, whether internally among their colleagues, externally with opposing counsel or through third parties.<sup>1088</sup> At best, this formal recognition could establish the distinction between lawyers as negotiators and their other professional roles and obligations within the legal system. The silent treatment currently given to negotiations in legal ethics codes can, by adopting this reform proposal, have an explicit voice that prevents lawyers from concluding that certain negotiation behaviour, namely deception, is acceptable. On the other hand, the clarity may also cause conflict if that clarity contravenes acceptable negotiation practice, community standards, or case law. This is not to say that community standards or negotiation principles are not viable; however it is to stress that the legal profession can take this opportunity to clarify professional standards related to negotiation relative to any conflicting community standards, including whether the use of potentially deceptive or misleading practices is permissible by lawyers. Any

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<sup>1087</sup> Wilkinson, Walker and Mercer, above n 472, 656-657.

<sup>1088</sup> Chart, above n 899, 178-179 ("Negotiation is therefore an inevitable and major part of what lawyers do, in terms both of the significance of their negotiation efforts for clients, and the amount of time they devote to it.").

conflicts that arise can and should also be addressed as soon as possible within the ethics codes to ensure further clarity on the role of lawyer as negotiator.

A second benefit of this legal regulation proposal is that it can address the questions and perceptions related to whether lawyers are professionals or simply consultants and business people who pursue the profit motive above their duty to serve the public interest. As Loder and Morawetz, among others, have pointed out, those who enter law school and the profession enter with a moral predisposition that might only be further accentuated through law school training.<sup>1089</sup> If this is the case, most future lawyers as law students would see very little value in professional ethics courses.<sup>1090</sup> This seems to be further reinforced by the fact that, at most law schools, professional ethics education is relegated to a single second-level required or elective course.<sup>1091</sup>

Collectively, what this seems to indicate is a pattern where incoming lawyers see ethics as a personal choice to be made by the individual, not a choice imposed by external rules as in the case of legal ethics codes. The tension is between the individual lawyer exercising his/her own personal sense of what is right and wrong and the professional obligations as codified under the legal ethics codes since, generally, 'the notion of ethics itself...presumes that persons are autonomous moral agents'.<sup>1092</sup>

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<sup>1089</sup> See, eg, Loder, above n 42, 333; Morawetz, above n 481; Zacharias, above n 481, 386.

<sup>1090</sup> Moliterno, above n 453, 259.

<sup>1091</sup> See generally Moliterno, above n 453, 259 (comparing the teaching of professional ethics among four well-known and top-ranked law schools and its impact of preparedness in dealing with ethical problems).

<sup>1092</sup> Wilkinson, Walker and Mercer, above n 472, 648-649 (quoting Ladd, above n 19, 105.) See also J Honsberger, 'Legal Rules, Ethical Choices and Professional Conduct' (1987) 21 *Law Society Gazette* 113 (stating that codes of conduct are at odds with most notions of ethics, which involve personal choice, not rules imposed by external agents). Cf W William Hode, 'Rethinking the Way Law is Taught: Can We Improve Lawyer Professionalism by Teaching Hired Guns to Aim Better?'

The key point here and the central issue to be addressed by this first legal regulation proposal is that when individuals, exercising their own personal ethics prior to entering law school, become law students and subsequently enter the legal profession, they cease being independent moral agents and must, at least within their professional capacity, have the skills to make ethical decisions consistent with the intent and purpose of the legal ethics codes. They may also need to discern and balance a course of action that is consistent with their personal morals and professional ethics. To the extent that they lack proper moral reasoning skills or the ethics codes are silent on the prescribed code of conduct, lawyers as professionals may have no choice but to revert to their personal ethics or the prevailing ethical views for guidance. This guidance may directly conflict with perceived professional obligations and duties. In the case of lawyers as negotiators, bringing clarity to the minimum standard of behaviour expected by lawyers in negotiation can only benefit the profession.

An example of how this proposal can be easily integrated into the current legal ethics codes, as presented and discussed in Chapter 4, is Chapter 11 of the Law Society of Alberta's *Code of Professional Conduct* in Alberta Canada, which formally and progressively recognises that certain ethical obligations do apply when lawyers serve in the capacity of negotiators.<sup>1093</sup> The Law Society of Alberta's *Code of Professional Conduct* also addresses the issue of law as a business in Chapter 8.<sup>1094</sup> Chapter 8 explicitly recognises the significant business aspects of the practice of law

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(1998/1999) 87 *Kentucky Law Journal* 1019, 1046-1049 (describing Notre Dame Law School's ethics programme in the United States, where law students are encouraged "to establish their own personal standards of professionalism and to face up to the difficult choices that a life in the law can bring.").

<sup>1093</sup> *The Law Society of Alberta Code of Professional Conduct*, above n 687, 11-1.

<sup>1094</sup> *The Law Society of Alberta Code of Professional Conduct*, above n 687, 8-1 (Statement of Principle).

by requiring lawyers to comply with the highest standards of business ethics in this aspect of the profession.<sup>1095</sup> However it also clearly and unambiguously relegates the business aspect of practice to its primary role, stating that '[a]t all times, however, the lawyer remains a professional and has an obligation to behave as such.'<sup>1096</sup>

In summary, the inclusion of a separate section on lawyers as negotiators is an explicit and timely recognition by the Alberta legal jurisdiction that not only is the Alberta legal jurisdiction cognisant that deception might be considered a generally acceptable negotiation practice but that lawyers practicing as negotiators within Alberta's jurisdiction are barred from using such deception and are expected to uphold the highest standards of honesty and integrity, even as negotiators. The message is consistent, clear, unambiguous, and obligatory, upholding the highest standards of professional conduct even at the lowest level of a lawyer's function or task.

### **7.3.2 Proposal 2 - Establish Consistency within Legal Ethics Codes Regarding Negotiation Behaviour**

The second legal regulation reform proposal involves establishing consistency within the legal ethics codes regarding the appropriate behaviours expected of legal professional, especially with regards to deception in negotiation.<sup>1097</sup>

One of the most consistent and important criticisms of addressing the issue of lawyer deception in negotiation is that the inconsistency regarding conduct in negotiation within the legal ethics code potentially leads to even more confusion and

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<sup>1095</sup> Ibid.

<sup>1096</sup> *The Law Society of Alberta Code of Professional Conduct*, above n 687, 8-1 (Statement of Principle), Commentary G.1.

<sup>1097</sup> Michael D Daigneault and Jack Marshall, 'A House Divided' (1997) 44-MAY *Federal Lawyer* 18 ("It is also clear that many attorney conduct rules applied to negotiations, particularly those modelled after Rule 4.1, are insufficient and ineffective. To appropriately moderate attorney conduct in negotiation settings it would appear that we should at least establish clear rules and guidelines specific to the uniqueness of legal negotiation settings.").

inconsistency in lawyer conduct.<sup>1098</sup> This can result in inconsistent behaviours among those using and interpreting the legal ethics codes. One way to create consistency within the legal ethics code is to remove the offending phrases within the legal ethics codes so that a consistent message is retained and communicated regarding expected behaviour.

For example, Rule 4.1 of the ABA Model Rules has often been criticised as making an exemption for deception in negotiation and thereby creating a slippery slope in terms of condoning deceptive conduct. Critics argue that Rule 4.1 is in direct contravention of the ABA Model Rules Preamble, which requires honesty in negotiations.<sup>1099</sup> A relatively simple solution to this inconsistency is to adopt this proposed reform and remove the inconsistency in the legal ethics code of the American Bar Association. This may be done in several ways as recommended below.

One way to create consistency is to remove the problematic phrase in the comment to Rule 4.1 that refers to generally accepted conventions in negotiations. This would mean that the only reference to negotiation would be in the Preamble and would apply across all rules. In turn, this would mean that lawyers would be subject to the goals of the Preamble with regards to negotiations and must strive to conduct such negotiations with honesty and integrity.

A second way to create greater consistency within the legal ethics code might be to remove any reference to negotiations in the Preamble of the ABA MRPC. By doing so, lawyers would be held only to the standard of Rule 4.1. This is likely to be

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<sup>1098</sup> See Chapter 4 (Efforts by Legal Ethics Codes to Regulate Deceptive Behaviours in Negotiation) for more discussion on various legal ethics codes and a comparative analysis of how they address the issue of deception in negotiation.

<sup>1099</sup> *Model Rules of Professional Conduct* (MRPC), Rule 4.1, comments; *Model Rules of Professional Conduct* (MRPC), Preamble; Thurman, above n 148.

a controversial approach because the comment to Rule 4.1, on its face, appears to condone deceptive or misleading conduct by lawyer-negotiators, a concept which would likely run afoul of the high standards of professional and personal conduct expected of those in the legal profession and as expressed in other rules of the ABA MRPC.

A third, potentially middle-of-the-way approach, to create greater consistency in the legal ethics code involves two phases. A precursor to this approach is the understanding that there is an interdependent relationship between law and morality and negotiation is one key dispute resolution mechanism where this intersection is more readily evident.<sup>1100</sup> In the first phase of this compromise approach, the provision of the Preamble of the ABA MRPC could be retained along with a proviso or footnote referring to certain key cases where the common law courts have held certain negotiation practices in certain jurisdictions as being permissible, such as puffing or bluffing on the final settlement figure.

The second phase of this compromise approach involves amending the comment to Rule 4.1 so that it is consistent with the message of the Preamble. This would ensure that if references to negotiation are included within the Preamble and the comment to Rule 4.1, such references are consistent in content and meaning. To be sure, exceptions to the professional ethics obligation of honesty, trustworthiness, and fairness for every lawyer should be explicitly stated in the legal ethics code and not left to the whim of those interpreting general and relatively limitless phrases such as ‘generally acceptable negotiation conventions’ without an empirical, legal, or evidentiary basis for so doing.

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<sup>1100</sup> See, eg, Honoré, above n 115 (discussing the importance of understanding the integration of law and morality as it affects the development and implementation of rules).

The benefits of this second legal regulation reform proposal towards greater consistency within a code of professional ethics are numerous. They include a greater chance of consistency in behaviour, a clear and achievable standard of behaviour for the profession, a measurable standard for those who might violate the particular provisions of the ethics code, and a gauge by which to teach negotiation ethics in a clear, consistent approach.

### **7.3.3 Proposal 3 – Dissolve the ‘Materiality’ Requirement for Facts and Law in the Negotiation Context**

The third legal regulation reform proposal recommends a modest change to the legal ethics codes to take into account the nature of the negotiation process.

Generally, law and the rules and legal ethics codes which support the application and enforcement of legal regulations work under the legal and ethical obligation to disclose only *materially* relevant documents and information.<sup>1101</sup> This requirement, termed the ‘materially relevant requirement’ in this section, is intended to ensure that all parties have knowledge of facts and law that is materially relevant to resolving the dispute. What is materially relevant is not always defined, either in case law or in the legal ethics codes. However, at least one U.S. court has defined ‘material facts’ as those ‘which, if known to the client, might well have caused him, acting as a reasonable man, to alter his proposed course of conduct.’<sup>1102</sup>

In addition, what is considered materially relevant to one party may or may not be the case for the opposing party or third parties having an interest in the dispute. In the case of negotiations, a generally private process, what is considered materially

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<sup>1101</sup> See Chapter 4 (Efforts by Professional Ethics Codes to Regulate Deceptive Behaviours in Negotiation) for a discussion of some of these provisions.

<sup>1102</sup> Lerman, above n 60, 686 (quoting *Spector*, 361 F.Supp. 30, 40 (S.D.N.Y. 1972), modified on other grounds, 485 F. 2d 474 (2d Cir. 1973).

relevant by the courts may be downright irrelevant in getting a good negotiated agreement or resolution to the dispute.<sup>1103</sup> It appears that the materially relevant requirement is based on the assumption that one side should only have to disclose what is absolutely necessary to win their case, whether facts or law. Each side can thus hide or are not required to disclose ‘shades of grey’ information or information which may be in the other party’s best interests unless it is intentionally disclosed, found out by the opposing party, or revealed in court. This is the crux of the adversary system, to protect one client’s interests and zealously defend their case against another client.

Negotiation, however, is a critical and important process that encourages and relies, in part, on full disclosure of all facts and law in order to reach a resolution to the dispute. One of the hallmarks of why negotiation is successful is because of the flexibility and opportunity to be fully open and honest about each party’s underlying interests and to disclose any information without fear that such information will be used against either party.<sup>1104</sup> The goal of the ‘good outcome’ in negotiation as discussed by Bordone and other scholars<sup>1105</sup> depends not on revealing only what is materially relevant but also on disclosing anything which might aid in resolving the dispute to each party’s relative satisfaction. I use the term ‘relative’ in reference to satisfaction here because each party generally comes to a negotiation with different requirements and interests and the satisfaction of these terms and interests are specific to the negotiating party. At its worse, the materiality requirement as applied to

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<sup>1103</sup> See, eg, Mize, above n 66, 247 (arguing that negotiation is different from other contexts).

<sup>1104</sup> See, eg, Mize, above n 66, 246-247 (discussing some of the benefits of negotiation over other processes); Lewicki et al, above n 25.

<sup>1105</sup> Bordone, above n 96, 16-18. See also Fisher, above n 98, 107-08; Bruce Patton, ‘Negotiation’ in Michael L Moffitt and Robert C Bordone (eds) *The Handbook of Dispute Resolution* (2005) 285-286.



negotiation invites competitive, distributive bargaining tactics of which deception is a central strategy.

The recommendation of the third legal regulation reform proposal is to dissolve the ‘materially relevant’ requirement for negotiations, allowing lawyers to conduct the negotiation with the obligation or option to disclose all facts (and law if relevant) necessary to ensure an effective, durable, and just agreement that brings about resolution of the dispute. The materially relevant requirement may be efficient in a court of law or arbitration that is constrained by court rules, rules of evidence, and costs; however, it is likely inefficient and unnecessary in the context of a negotiation, where parties may be well-resourced, well represented, and must have sufficient trust and disclosure to not only ascertain the truth but to also reach a good outcome consistent with the interests of justice.<sup>1106</sup> Amending the materially relevant requirement as it applies to negotiations so as to completely dissolve this requirement or to allow for the obligation of revealing all facts (and law, where needed) would have two primary benefits.

The first benefit of this third legal regulation reform proposal is that it would ensure that lawyers, as negotiators, are able to work on a level playing field with those clients who would choose to be self-represented or represented by a non-lawyer.<sup>1107</sup> A self-represented person also has an interest in the outcome of the negotiation while a non-lawyer is someone who is not a qualified and registered lawyer. Removing the materiality requirement also removes the internal conflict created by deliberating what can and cannot be revealed. It might also allow for greater cooperative or mixed-

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<sup>1106</sup> Carol Bowen, ‘Reconciling Truth and Efficiency’ (2008) *Update* 6-7. *Update* is a publication of LEADR Association of Dispute Resolvers.

<sup>1107</sup> Mize, above n 66, 248 (arguing that the same standards should apply to lawyer-negotiators as non-lawyer negotiators).

motive negotiations where deception (or strategic posturing) does not have to be a generally accepted *modus operandi* of negotiations.

A second benefit of this legal regulation reform is that it allows lawyers as negotiators to have greater leeway in zealously representing their clients and their client's interests within the bounds of the law. This proposal does not take away zealous representation of clients. It does, however, expand the scope of effort and resources available to the lawyer as negotiator in assisting his or her client to reach an agreeable resolution to the dispute that also has the greatest potential to maximise the benefit to both parties. It also addresses criticisms that lawyers hide behind the materially relevant requirement as a means to retain the upper hand and be too adversarial. Finally, it would address the concern and perception that lawyers are deceptive or not fully forthcoming due to the legal ethics rules and the justifiable excuses by lawyers based on these rules.

In the best case scenario, amending the materially relevant requirement may increase the chances of greater candour and greater efficiency in resolving disputes. One could argue that deception, while accepted as a normal part of current negotiation theory, could not be as efficient and honest as cases where deception is not an inherent part of the bargaining dance. The distinction I am making here is between intentional deception used as strategic posturing versus deception caused as a result of misunderstanding, misinformation, non-information, or just simple oversight. The latter might fall under the category of unintentional, correctable, and mitigating deception.

However, some may argue that this proposal may be hard to implement simply because there is an engrained culture in law and negotiation that is built on an

adversarial foundation and thrives on the game of conflict. Regardless of potential disagreements, looking at the materiality requirement as it applies, or should not apply to negotiations, is a step towards ensuring that legal regulations offer the best hope of effectively, consistently, and efficiently resolving disputes.

In summary, this section presented and discussed the benefits of implementing three legal regulation reforms to address the issue of lawyer deception in negotiation. As discussed earlier, legal regulation plays a key role in a rule-based, positivist legal culture. At the same time, as research and current practices demonstrate, legal regulation is only part of the solution. Legal regulation reform requires complimentary changes in the form of ethical standard setting and institutional design. The legal regulation policy reforms recommended above are one part of a three-part solution to addressing the issue of lawyers' potentially deceptive conduct in negotiation. A second, equally crucial component of the tripartite solution is ethical standard setting reforms. While the legal regulation reforms change the letter of the law, the ethical standard setting reforms ensure that changes to the letter of the law reflect the values the profession strives to encourage and that these values and principles are effectively taught to those who enter the profession. Furthermore, ethical standard setting reforms ensure that the ethics principles underlying the law are understood and consistently practiced. The next section discusses three ethical standard setting reform proposals.

## **7.4 ETHICAL STANDARD SETTING REFORMS**

Ethical standard setting<sup>1108</sup> refers to ethics being at the heart of any governance reform. In this case, the governance reform is an integrated reform of how lawyers might negotiate as legal professionals and how codes of professional conduct play a part in setting the standards of behaviour. Ethical standard setting can be most easily accomplished through the establishment of ethics codes, preferably those which are ‘first and foremost aspirational (setting out the highest ideal of public service) while containing disciplinary elements (imposing sanctions on those that fall unacceptably short).’<sup>1109</sup> In addition, ethical standard setting can go further and ensure that such ethics codes have weight and meaning and are living embodiments of the values it proposes to uphold.<sup>1110</sup> The ethical standard setting reform proposals presented in this section are aligned towards the goal of fully integrating the highest possible moral compass amongst legal professionals, especially with regards to the potential use of deception in negotiation.

### **7.4.1 Proposal 1 – Establish Core Values Across the Legal Profession Regardless of Function**

The first ethical standard setting reform proposal involves explicitly defining the core values of the legal profession as whole, regardless of function or jurisdiction.

As discussed above, lawyers play a variety of roles in the course of their practice. In this thesis, ‘role’ is synonymous with ‘function’, meaning that a lawyer

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<sup>1108</sup> Preston, Sampford, and Connors, above n 1078, 5 (explaining ‘ethical standard setting’ as “creating codes of conduct and trying to get relevant players to abide by them.”).

<sup>1109</sup> Preston, Sampford, and Connors, above n 1078, 174.

<sup>1110</sup> Preston, Sampford, and Connors, above n 1078, 164 (arguing that “[e]thical norms are primarily and essentially positive proscriptions. Ethics is not primarily about what you should avoid but what you should seek to achieve.”). In many ways this might apply to other professions, but law appears to be driven by more negative proscriptions on what you should not do and this same thinking is used in ethics codes (i.e. they are seen as rules that elicit punishment and not as positive aspirations of what you should attempt to achieve as a legal professional in any particular setting.).

may be acting in a variety of functions in order to serve clients. These functions include serving as negotiator, advocate, mediator, arbitrator, prosecutor, and judge. As discussed in detail in Chapter 4, the expected and minimum standard of behaviour for each of these key roles is generally defined in the legal ethics code of the relevant jurisdiction.<sup>1111</sup>

In recent years, and this may be the prevailing yet unexpressed feeling for many years, there has been increased literature and consensus among practitioners and scholars that changes in how law is perceived as a profession have resulted in a marked decrease in retaining the core values of the profession.<sup>1112</sup> Some of these changes include a greater globalisation of the profession, an increased focus in law as a business rather than a profession, a greater profit motive amongst the largest firms combined with less focus on pro bono or public service work, increased billable hour requirements, lamentable rates of health issues among those in the legal profession, and a loss of the core values that are the foundational and guiding principles of the legal profession.<sup>1113</sup> Certainly, if one were to believe the consumer studies of the Gallup organisation and the American Bar Association in the United States as well as similar studies in Australia as discussed in Chapter 6,<sup>1114</sup> the legal profession has been in a state of crisis at least over the last ten (10) years.

Globalisation of the legal profession has been a key contributor to the perceived erosion of values. It has been argued that the aspects of ‘professionalism’,

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<sup>1111</sup> See Chapter 4 (Efforts by Professional Ethics Codes to Regulate Deceptive Behaviours in Negotiation) for more information on this topic.

<sup>1112</sup> See generally, Kronman, above n 547; Kirby, above n 677; Bok, above n 547.

<sup>1113</sup> Rhode, above n 151. See also Deborah L Rhode, ‘The Profession and Its Discontents’ (2000) 61 *Ohio State Law Journal* 1335; Kirby, above n 677; Berkovic, above n 963, 2; Merritt, above n 560, 2; Bok, above n 547, 1.

<sup>1114</sup> Please see Chapter 6, section 6.7 (name of section) for a detailed discussion of these various consumer studies.

such as collegiality, loyalty to the profession, and public service,<sup>1115</sup> that are so critical to the profession of law and the promise of the law have been brushed aside in favour of the business of law, creating all manner of tension within and outside of the profession.<sup>1116</sup> Globalisation of legal practice<sup>1117</sup> has also played a part in the evolution of multidisciplinary practices and an increased use of technology and ADR in the legal profession. Greater scrutiny and heightened discussion about the impact of such external forces and events upon the internal stabilizing values that guide the legal profession is necessary.<sup>1118</sup> Now more than ever, such heightened awareness needs to be cross-jurisdictional and global.

One way to address the concerns of market-based lawyering, globalisation, and an erosion of professional standards is to implement this first ethical standard setting reform by formally and clearly establishing core values across the broad spectrum of activities within the legal profession. Today, the legal ethics codes seem to implicitly identify at least four core values of the legal profession – serving the public interest, zealous representation, honesty, and fairness. However, these are not consistent across legal ethics codes, certainly not across the legal ethics codes which were the focus of this thesis.<sup>1119</sup>

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<sup>1115</sup> See, eg, Davis, above n 171, 342-343.

<sup>1116</sup> See, eg, Davis, above n 171, 342; Postema, above n 160; Merritt, above n 560, 63-89; Carrie Menkel-Meadow, 'Ethics, Morality and Professional Responsibility in Negotiation' in Phyllis Bernard and Bryant Garth (eds), *Dispute Resolution Ethics: A Comprehensive Guide* (2002) 119-146.

<sup>1117</sup> Note: This includes the Australian legal profession's move towards reforms to foster national legal practice.

<sup>1118</sup> See, eg, Steven Mark, 'Harmonization or Homogenization? The Globalization of Law and Legal Ethics – An Australian Viewpoint' (2001) 34 *Vanderbilt Journal of Transnational Law* 1173 (discussing the impact of globalisation on legal ethics and the future of law practice with a focus on New South Wales, Australia).

<sup>1119</sup> Please see Chapter 4 (name of chapter) for further discussion on the results of an original qualitative and cross-jurisdictional study of legal ethics codes.

This proposal recommends an explicit, visible, and penetratingly measurable *raison d'être* for the legal profession in the 21<sup>st</sup> century. Scholars such as Preston, Sampford, and Connors have called this the 'justification' for why the institution exists<sup>1120</sup> and the values that drive that justification. In addition, these core values are not function or task specific but apply equally across all activities of the institution. Applied equally, the justification can provide institutional integrity to both internal and external stakeholders, such as academic institutions, clients, and non-legal organisations, as well as to all activities and tasks carried out by the institution. As stated by Preston, Sampford, and Connors, '[i]f we know the values we should be furthering and what we should be doing to further them, then, we can identify a large range of activities that do not further those values.'<sup>1121</sup> Furthermore, the legal ethics codes can begin to align expected behaviours with those values. This would be especially beneficial in the case of the use of deception in negotiation since negotiation as a dispute resolution process is a clear demonstration of law intersecting with morality (values).<sup>1122</sup>

While it might not be possible to implement a global legal ethics code that applies across all legal jurisdictions to all legal professionals as suggested by Hazard and Dondi, it is possible to establish a set of core values that legal professionals can strive towards across legal jurisdictions. These core values might represent, for

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<sup>1120</sup> See generally, Preston, Sampford, and Connors, above n 1078;

<sup>1121</sup> Preston, Sampford, and Connors, above n 1078, 164. See also *Queensland Public Sector Ethics Act 1994* (describing some key guiding values).

<sup>1122</sup> Daigneault and Marshall, above n 1097, 18 ("In the absence of better guidelines regarding negotiation tactics, attorneys should consider not only the legal implications but how they personally feel about and are affected by deceptive and misleading negotiation practices, and act accordingly. Whenever possible, attorneys need to identify and use alternative approaches to negotiation that make the process more open, fair, ethical, and more mutually beneficial for all parties involved. Where scholarship has failed, professional integrity may yet triumph."). In this section, I argue that a consistent and conspicuous set of professional values can assist in this process.

example, the promise of the law as envisioned by the legal profession such as serving the public interest, honesty and fairness in dealing with clients and colleagues alike, and pursuit of justice within the bounds of the law. This is similar to a constitution at the level of the profession that provides unifying values and clear mandates which guide the legal profession regardless of geographic location, jurisdiction, function, or task.<sup>1123</sup> The ideal means of implementing this reform proposal is to establish the core values and principles of the profession first, align the ethics code or rules of law with those core values and then structure legal education, clinical training, CLE courses, and other activities around this foundation.

One way to ensure this integration and reinforcement of core values is by implementing the second and third ethical standard setting proposals discussed below.

#### **7.4.2 Proposal 2 – Increase CLE Courses on Ethics**

The second ethical standard setting reform proposal recommends increased continuing legal education (CLE) courses for current and future legal practitioners.

As the core values of the profession are re-established in a measurable way, the profession can incorporate more continuing legal education courses (CLE) on ethics and handling ethical dilemmas, particular in the case of the use of potential deceptive tactics in negotiation. The professional ethics course is taught in law schools,<sup>1124</sup> though, at least in the United States, it is generally taught after the all-important first-year core courses. In the case of the common law countries discussed in this thesis, these professional ethics courses discuss the ethics of the profession

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<sup>1123</sup> Note: It is acknowledged that the focus of this thesis has been on the common-law jurisdiction. However, while individual legal regulations may differ across legal jurisdiction, I argue that the core values which guide the legal professional's work in each of these jurisdictions can be aligned. This does not necessarily change *what* the law is; however, it may change *how* the lawyer explains, enforces, implements, and uses the law in service to his/her client.

<sup>1124</sup> Mize, above n 66, 248 ("honesty in negotiation can be encouraged with education and gradually changing attitudes...shift has already begun...").



primarily through memorisation of the legal ethics rules, discussion of case law, and analysis of the ethics violation cases in the relevant jurisdiction.

More importantly, as confirmed by the research on legal ethics discussed in Chapter 2, legal practitioners in the US and Canada appear to learn about acceptable and impermissible lawyer conduct more through the visible actions of senior lawyers in each legal jurisdiction.<sup>1125</sup> It is reasonable to expect that the same could be true in other countries such as Australia and Hong Kong. In the context of this thesis, relying solely on legal ethics courses to teach appropriate negotiation behaviour is no longer sufficient because negotiation today is not a regulated process and therefore not a focus of greater scrutiny.<sup>1126</sup> The professional body of each jurisdiction would benefit from an increased number of required CLE courses on ethics as well as greater quality of such courses to go beyond the current ethics rules and case law analysis. There are several ways to implement this second ethical standard setting reform proposal.

One way to implement this second ethical standard setting proposal and increase the quality of such CLE courses is to incorporate the discussion of comparative legal ethics codes.<sup>1127</sup> This means discussing the specific legal ethics rules in light of other jurisdictions and the possible implications, for example, of following the home jurisdiction's ethics code versus that of the visiting jurisdiction. This would foster a deeper understanding of ethics in the profession of law, the reason

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<sup>1125</sup> See, eg, Wilkinson, Walker and Mercer, above n 472, 645 (discussing a study of the use and effectiveness of legal ethics codes in Ontario, Canada and finding that for the majority of practicing lawyers, the legal ethics code is not necessarily the first point of reference for ethical issues).

<sup>1126</sup> Note: I am not arguing that negotiation should be highly regulated.

<sup>1127</sup> Laurel S Terry, 'U.S. Legal Ethics: The Coming of Age of Global and Comparative Perspectives' (2005) 4(3) *Washington University Global Studies Law Review* 463, 533 (arguing that comparative and global perspectives will be increasingly important in US legal ethics debates, primarily as "[t]heory has significantly lagged behind the reality of transnational legal practice issues and developments."); Geoffrey C Hazard, Jr and Angelo Dondi, *Legal Ethics: A Comparative Study* (2004) (reinforcing the need for comparative legal ethics education and discussing a comparative study of lawyers' roles in a variety of jurisdictions).

for potential cross-jurisdictional differences, if any, and a continuing critical analysis and evolution of the legal ethics code.<sup>1128</sup> The benefit of this approach is to gradually increase the extent to which lawyers feel confident discussing the ethical issues they face on a daily basis as well as to develop critical morality<sup>1129</sup> rather than being confined by role morality.<sup>1130</sup>

A second way to implement this second ethical standard setting proposal is to integrate a set of moral reasoning CLE courses into the current set of CLE courses. Moral reasoning is different from ethics courses in that moral reasoning is aimed at developing one's judgment to the point of being considered to have *good* judgment that will aid in making sound decisions when faced with ethical dilemmas.

Kronman defines judgment as 'the process of deliberating about and deciding personal, moral, and political problems.'<sup>1131</sup> It is not just this basic level of judgment that lawyers must have. Lawyers, given their professional status, must have *good* judgment, which is judgment beyond simple deduction or intuition. Kronman describes 'good judgment' as follows:

'most clearly revealed in just those situations where the method of deduction is least applicable, where the ambiguities are greatest and the demand for proof most obviously misplaced....to do something more than merely apply a general rule with special care and thoroughness, or follow out its consequences to a greater level of detail.'<sup>1132</sup>

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<sup>1128</sup> See, eg, Hazard and Dondi, above n 1127 (discussing a comparative study of lawyers' roles in a variety of jurisdictions); See also Amalia D Kessler, *Review: Legal Ethics: A Comparative Study by Geoffrey C. Hazard, Jr. and Angelo Dondi. Stanford: Stanford University Press, 2004* (2005) <<http://www.bsos.umd.edu/gvpt/lpbr/subpages/reviews/hazard-dondi105.htm>> at 9 August 2010 (reviewing Hazard and Dondi's book).

<sup>1129</sup> Parker and Sampford, above n 200 (discussing the importance of developing critical morality in legal ethics).

<sup>1130</sup> See eg David Luban, 'The Adversary System Excuse', in David Luban (ed.), *The Ethics of Lawyers* (1994) 139-147 (discussing the aspects of role morality that drive lawyers and the legal profession in the adversary system).

<sup>1131</sup> Kronman, above n 1086, 846-848.

<sup>1132</sup> Kronman, above n 1086, 847.

Kronman advocates for the importance of developing good judgment, especially as related to US lawyers, because he argues that legal ethics courses in the US seem to focus more on applying general rules than on developing a level of professional judgement necessary to handle ethical dilemmas. Ethically ambiguous or ethically challenging situations such as those found by Lamb and Lerman in their separate anecdotal studies<sup>1133</sup> are precisely those types of situations where lawyers need to be able to do something more than just apply legal rules, determine long-range consequences, or conduct a risk-benefit analysis. Lawyers may be skilled in knowing the boundaries of the professional ethics rules; however, today, lawyers need to be more skilled in the ‘grey’ areas where rules and boundaries are less clear, more ambiguous, and potentially career-threatening.

In summary, the benefit of implementing this second ethical standard setting proposal is that lawyers will develop good judgment and be more skilled in handling difficult ethical situations through critical morality while engaged in role-morality tasks.

#### **7.4.3 Proposal 3 – Integrate In-depth Ethics and Moral Reasoning Education into Law School Curriculum**

The third ethical standard setting reform proposal involves the integration of in-depth ethics and moral reasoning skills into the core law school courses. This proposal is aimed at law students and those who might consider entering the legal profession. First, it is important to address the difference between legal reasoning skills and moral reasoning skills as used in the context of this reform proposal and this thesis.

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<sup>1133</sup> Lamb, above n 448, 217-234. See also Lerman, above n 60.

*Legal reasoning* refers to the ability to read legal rules and principles, such as statutes and case law, find and dissect legal issues, and build a case for the client based on the application of law to the facts of the case. Legal reasoning skills help law students ‘think like a lawyer’ in terms of legal analysis and the technical aspects of being a legal professional.

In contrast, *moral reasoning* as introduced earlier in section 7.4.2<sup>1134</sup> refers to the skills necessary for a legal practitioner to exercise sound judgment when faced with the types of ethical dilemmas discussed by scholars such as Lamb and Wilkinson et al in Chapter 2.<sup>1135</sup> Developing moral reasoning skills is less about ‘how to *think* like a lawyer’ and more about ‘how to *be* a lawyer’, ‘how to be an ethical lawyer’, or even ‘how to be an honest lawyer’. This is particularly important when dealing with issues such as deception in negotiation given that this issue intersects both law and morality with multi-disciplinary influences, such as business and economics.

Legal education in most common-law jurisdictions centres primarily on the development of legal reasoning skills. While a legal ethics course is now usually a required course, there appear to be two primary issues with current legal ethics courses.

The first issue with current legal ethics courses is that such courses are primarily a rules-based course that focuses on remembering the legal ethics rules and the application of those rules to ethics problems encountered in practice.<sup>1136</sup>

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<sup>1134</sup> See Chapter 7, Section 7.4.2 (Proposal 2 – Increase CLE Courses on Ethics) for more information.

<sup>1135</sup> See Chapter 2, Section 2.5.4 (Research About Legal Ethics) for more information on the research by Lamb and Wilkinson et al.

<sup>1136</sup> Note: It is acknowledged that there may be legal ethics courses that are taught differently and are more in-depth; however, the majority are still rules-based legal ethics courses. Cf Mary Keyes and Richard Johnstone, ‘Changing Legal Education: Rhetoric, Reality, and Prospects for the Future’ (2004) 26(4) *Sydney Law Review* 537, n 103-105 (describing the law school curriculum in Australia as discussed in the Australian Universities Teaching Committee (AUTC) Report); Michael Robertson,

The second issue with current legal ethics courses is that the majority of law schools in the common-law jurisdiction require only one legal ethics course over a three- or four-year legal education programme.<sup>1137</sup> This single legal ethics course is generally taken as one of the last required courses in law school and consists of a cursory review of the black-letter legal ethics rules of the prevailing jurisdiction along with some study of some relevant case law.<sup>1138</sup> For example, in Australia, this meets with the required ‘Priestley 11’ subjects and is consistent with the ‘knowledge of professional rules’ approach of legal ethics teaching as described by Robertson.<sup>1139</sup> This ‘knowledge of professional rules’ approach is also common in the United States<sup>1140</sup> where it has been criticised as ‘the functional equivalent of legal ethics without the ethics’.<sup>1141</sup>

These two issues related to the ability of current common law jurisdiction legal ethics courses to influence ethical conduct underscore the findings of the research on legal ethics discussed in Chapter 2.<sup>1142</sup> To briefly summarize, in 1995, Moliterno’s U.S. study of the ability of a legal ethics course to prepare graduates for handling professional ethics issues in practice demonstrated that a single ethics course

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‘Renewing a Focus on Ethics in Legal Education?’ (2008) (discussing the AUTC Report on law schools’ commitment to ethics learning and describing it as ‘patchy’). This paper is on file with the author. See also Deborah Rhode, ‘Integrity in the Practice of Law: If Integrity is the Answer, What is the Question?’ (2003) 72 *Fordham Law Review* 333, 340 (discussing legal ethics education in the United States).

<sup>1137</sup> Moliterno, above n 453, 259 (discussing the law school curricula of four leading law schools in the United States and how they address professional ethics education). See also Keyes and Johnstone, above n 1136, 537 (discussing the nature of how legal ethics is taught in Australia – as a compulsory subject in most law schools though not necessarily as a first-year course).

<sup>1138</sup> Moliterno, above n 453, 259.

<sup>1139</sup> Robertson, above n 1136, 3 (discussing the ‘knowledge of professional rules’ approach). See also Keyes and Johnstone, above n 1136, 537 (discussing the Priestley 11 requirements and criticisms of this approach).

<sup>1140</sup> See, eg, Moliterno, above n 453, 263-264 (describing the professional ethics curricula at four top-rated law schools in the United States).

<sup>1141</sup> Rhode, above n 1136, 340

<sup>1142</sup> See Chapter 2, Section 2.5.4 (Research About Legal Ethics) for more information on this research. A brief summary of key points that relate to this reform proposal is provided here.

without ‘more’ is not sufficient to prepare legal practitioners for the rigors of handling actual ethics dilemmas.<sup>1143</sup> The reason Moliterno’s own law school (William and Mary Law School) rated higher in graduate preparedness over other law schools in the study is because William and Mary Law School integrates legal ethics skills education within an intensive two-year required skills program.<sup>1144</sup> Law students at William and Mary Law School learn black-letter legal ethics rules as well as how to solve ethical dilemmas in a simulated practice environment integrated with core law school courses over an intense two-year period.<sup>1145</sup> As applied to this thesis, issues such as deception in negotiation are handled by teaching negotiation tactics alongside of ‘truth-telling in negotiation’ to help students understand ‘legitimate client and lawyer considerations other than merely beating an opponent.’<sup>1146</sup>

Second, in 1999, Schweitzer and Croson’s US study on curtailing deception in negotiation through the use of direct questions found that an ethics course did not statistically affect a respondent’s use of deception in negotiation.<sup>1147</sup> Respondents who took an ethics course were just as likely to use deception in negotiation in the context of the study as those who did not take an ethics course.<sup>1148</sup>

Third, in 2000, Wilkinson, Walker and Mercer published the findings of a Canadian study on whether legal ethics codes shape legal practice and the behaviours

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<sup>1143</sup> Moliterno, above n 453, 271 (discussing the mean scores on professional ethics preparation across the law schools involved in the study, with William and Mary scoring the highest).

<sup>1144</sup> Moliterno, above n 453, 264-266.

<sup>1145</sup> Moliterno, above n 453, 264-269.

<sup>1146</sup> Moliterno, above n 453, 267-268.

<sup>1147</sup> Schweitzer and Croson, above n 326, 234.

<sup>1148</sup> Schweitzer and Croson, above n 326, 234 (stating that this does mean ethics courses cannot influence behaviour though it did not prevent the use of deception in this specific study). One perspective is that the scenario of used-car sales is a common negotiation scenario where potentially deceptive tactics, such as bluffing and puffing, are expected.

of legal professionals.<sup>1149</sup> They found that legal practitioners relied less on the legal ethics codes for guidance on key ethical dilemmas and relied more on advice from senior legal practitioners or personal morals.<sup>1150</sup>

It is possible to conclude from the research conducted to date on the effectiveness of legal ethics courses that it is not sufficient to simply require law students to take a single ethics course and conclude that these future lawyers are fully prepared for the ever-increasing ethical challenges they will likely face in practice, especially in the slippery slope forum that is negotiations.<sup>1151</sup> As discussed in earlier chapters, the issue of the use of deception in negotiation is complex and requires more than just knowledge of black-letter ethics rules and reliance on case law. More must be done.

As discussed earlier, the foundational competencies of what it takes to be a lawyer, not just think like one, are set in law school. Furthermore, as observed by Loder, MacKenzie, Toulmin, Morawetz, and Zacharias among others, most students entering the legal profession have moral predispositions that may only be further accentuated through indoctrination into the practice of law rather than modified through legal ethics courses.<sup>1152</sup> This is because of the generally accepted view in society that ethics is an internal, personal choice not a set of rules to be imposed by an external group.<sup>1153</sup> Incoming law students will likely face their first important ethical dilemma by attempting to reconcile their personal ethics rules with those that will be

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<sup>1149</sup> See generally, Wilkinson, Walker and Mercer, above n 472, 645.

<sup>1150</sup> Wilkinson, Walker and Mercer, above n 472, 678-680.

<sup>1151</sup> See Chapter 2, Section 2.2.2 (Deception as a Negotiation Strategy) for more information on the implications of this strategy).

<sup>1152</sup> See generally, Loder, above n 42, 311; G MacKenzie, 'The Valentine's Card in the Operating Room: Codes of Ethics and the Failing Ideals of the Legal Profession' (1995) 33 *Atlanta Law Review* 859, 869; S Toulmin, 'Ethics and Equity: The Tyranny of Principles (1981) *Law Society Gazette* 240, 244; Morawetz, above n 481; Zacharias, above n 481, 231.

<sup>1153</sup> Wilkinson, Walker and Mercer, above n 472, 648-649; See also Honsberger, above n 1092.

imposed on and expected of them through the lawyers' professional ethics rules. This must be dealt with at the foundational level by implementing this third ethical standard setting reform proposal and integrating in-depth ethics and moral reasoning skills education into the law school curriculum.

The most effective and long-lasting ethical standard setting reforms must be aimed at bringing the current law school curriculum into the 21<sup>st</sup> century consistent with changes in global legal practice.<sup>1154</sup> One of the primary ways to bring the current law school curriculum forward is to leverage Kohlberg's findings on moral development<sup>1155</sup> and to create a legal education environment that helps legal practitioners move towards greater moral maturity and integrity in decision making, especially as it relates to professional duties and obligations. This is particularly important to addressing the issue of lawyers' deception in negotiation.

Incoming law students need to be educated on the notion that, in some respects, they need to subordinate (or at best integrate) their personal values as independent moral agents in favour of other, overarching values<sup>1156</sup> and obligations when they enter the legal profession,<sup>1157</sup> where their professional actions must be consistent with the goals and ideals of the profession as embodied in the legal ethics code.

This tension between being an autonomous moral agent and exercising sound judgment in fulfilling the ethical obligations of the profession cannot be reconciled

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<sup>1154</sup> See generally Chart, above n 899, 177. While Chart's views are aimed primarily at New Zealand's legal education curricula, her observations, insights, and recommendations can be applied equally to legal education in other jurisdictions.

<sup>1155</sup> See Chapter 2, Section 2.5.4 (Research About Legal Ethics) for more information on this topic.

<sup>1156</sup> See Chapter 7, Section 7.4.1 (Establish Core Values Across the Legal Profession Regardless of Function) for a discussion on the ethical standard setting reform proposal aimed at addressing the values of the legal profession.

<sup>1157</sup> Wilkinson, Walker and Mercer, above n 472, 648-649 (discussing the fundamental issues and criticisms underlying professional ethics codes as conflicting with the general view that individuals are "autonomous moral agents").



within a single legal ethics course. Strictly teaching and following legal ethics rules may actually be detrimental to a lawyer's critical thinking and moral development. According to Loder, the ethics rules create a minimum standard that prevents lawyers from 'reaching beyond moral mediocrity'<sup>1158</sup> and may encourage 'undesirable customs and habits'.<sup>1159</sup> In addition, the Brockman study further identified that the rules only provide another challenge for lawyers to find ways to circumvent them given their training and propensity to hide information for a living.<sup>1160</sup> Rizzo further concurs by stating that '[m]orals become reduced to checking the code of professional responsibility; if the code does not prohibit an act, the act is moral.'<sup>1161</sup> In essence, the legal ethics rules can actually curtail moral development, cause moral apathy or expression, and create a general malaise about following the ethics rules.<sup>1162</sup> These issues are especially relevant in the case of negotiation because, as observed by the comparative study of legal ethics codes in Chapter 4, there is little to no guidance found in the legal ethics codes on how lawyers should behave in negotiations.<sup>1163</sup>

A practical way of leveraging Kohlberg's research on moral development in legal education is to adopt a different perspective of teaching legal ethics. Instead of using the current dominant 'knowledge of the professional rules' approach to legal ethics teaching, this third ethical standard setting proposal recommends adopting a

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<sup>1158</sup> Loder, above n 42, 312.

<sup>1159</sup> Ibid.

<sup>1160</sup> J Brockman, 'The Use of Self-Regulation to Curb Discrimination and Sexual Harassment in the Legal Profession' (1997) 35 *Osgoode Hall Law Journal* 209, 219. Brockman's study was about reducing discrimination. The comments by respondents about the general nature and views of lawyers in a self-regulated profession are applicable here.

<sup>1161</sup> P L Rizzo, 'Moral for Home, Morals for Office: The Double Ethical Life of a Civil Litigator' (1988) 35 *Catholic Lawyer* 79, 82.

<sup>1162</sup> See, eg, Loder, above n 42, 311.

<sup>1163</sup> Daigneault and Marshall, above n 1097, 18-19 ("Negotiation is an area that the legal community has failed to define, analyse, and codify adequately. Attorneys are left to blindly navigate its muddy waters at their own peril."). Despite the numerous books on legal negotiation and legal ethics, I would argue that this statement is as true today as it was in 1997. There has not been a significant, effective, measurable step towards providing sufficient guidance.

‘sound judgment’ approach<sup>1164</sup> through the strategic integration of moral discourse into legal education.<sup>1165</sup> Two concepts are important to discuss here.

The first important concept is the ‘*sound judgment*’ approach, which is markedly different from the prevailing ‘*knowledge of the professional rules*’ approach. The goal of the ‘sound judgment approach is to go beyond knowing and applying the legal ethics rules to ethical dilemmas as other black-letter courses. It is about putting the ethics back into legal ethics by developing a process of decision-making that can be used when faced with ethical dilemmas. This includes exercising moral judgment through moral discourse and critical morality, practicing the use of sound judgment in solving ethical dilemmas, and developing the ability to reconcile tensions between professional obligations as defined in the legal ethics code and personal morals so as to effectively and ethically execute the tasks associated with a lawyer’s professional obligations.

The second important concept in this reform proposal is the strategic integration of moral discourse. Similar to the difference between legal reasoning and moral reasoning discussed at the beginning of this section, there is a difference between legal discourse and moral discourse, though both elements are critical to addressing multi-disciplinary issues such as deception in negotiation.

*Legal discourse* is generally based on an extensive review and analysis of the facts of the case, law, holding of the case, and potential societal impact as seen through already decided appellate case opinions. Strict legal discourse involves legal reasoning. When legal discourse is also applied to ethics problems, the result is

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<sup>1164</sup> The ‘sound judgment’ approach is paraphrased from Robertson’s ‘judgment’ approach. See Robertson, above n 1136, 3-4.

<sup>1165</sup> See, eg, Robertson, above n 1136, 4 (supporting the use of this approach for legal ethics education in Australian law schools).

legalism<sup>1166</sup> of ethics, where ethical lawyering is simply a matter of following rules.<sup>1167</sup> This legal discourse is based on reductionism in that it is ‘a definable way of knowing and speaking about the world’<sup>1168</sup> where the world of legal education and the world of lawyers are seen by some as ‘bound worlds’<sup>1169</sup> that do not necessarily mirror or complement each other.<sup>1170</sup> This means that what is up for debate is very narrow, bound, defined, and controlled through rules and regulations which allow for legalistic discussions. Legalistic discussions only allow for ‘what is’ (e.g., evidence) and do not necessary allow for what ‘ought’ to be (e.g., value judgments or intuition).

In contrast, *ethical discourse* is one in which ‘we engage our students in dialogue about what it means to be a good lawyer, the nature of professional responsibility and the role of their own ideals in their professional development.’<sup>1171</sup> I would also argue that moral discourse needs to include ethical reasoning based on principles of logic.<sup>1172</sup> Keeping the above distinctions in mind, there are two primary recommendations to adopt and integrate moral discourse into the current law school curriculum.

The first recommendation for integrating moral discourse into the current law school curriculum is to include a required ethics and moral reasoning skills component in every core and non-core law school course, such as constitutional law,

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<sup>1166</sup> Judith Shklar, *Legalism* (1964) 1.

<sup>1167</sup> James R Elkins, ‘Moral Discourse and Legalism in Legal Education’ (1982) 32 *Journal of Legal Education* 12, 19. Note: This is not to say that following rules is improper but to stress that ethics issues cannot be wholly distilled to following ethics rules. See, eg, Lamb, above n 448, 217-234 (discussing the Australian perspective); Wilkinson, Walker and Mercer, above n 472, 645 (discussing the Ontario, Canada perspective); Daigneault and Marshall, above n 1097, 18 (discussing the United States perspective on rules, or lack thereof, to assist in ethical negotiation).

<sup>1168</sup> Elkins, above n 1167, 13.

<sup>1169</sup> Elkins, above n 1167, 15 (citing Scott Turow, *One L* (1977)).

<sup>1170</sup> Ibid. Elkins does make the qualification that there is no longitudinal study of whether legal education paves the way for legal practice; however, there is ample criticism of this. See, eg, Chart, above n 899, 177.

<sup>1171</sup> Elkins, above n 1167, 14.

<sup>1172</sup> See, eg, Luban, above n 1130, 169-178.

property law, criminal law, contracts, equity, ADR courses, and intellectual property law. While it is acknowledged that some law schools might already adopt this approach, it is not the norm. This first recommendation is to more formally adopt an integrated approach to ethics and moral reasoning skills development so that the lawyers of tomorrow become so as a direct result of the legal education they undertake today.<sup>1173</sup> For example, Luban encourages the use of applying logical arguments to ethical dilemmas using moral discourse to determine possible courses of action.<sup>1174</sup> In the context of the issue of lawyer deception in negotiation, students may enter law school as honest lay persons<sup>1175</sup> with a strong personal ethic against deception and leave as future lawyers who understand that deception is a necessary part of negotiation because they do not hear otherwise and the legal ethics codes do not provide sufficient guidance. Formally integrating ethics and moral reasoning skill training will address this gap so that lawyers are able to discern between ethically ambiguous choices, such as whether to use deception in negotiation.

One option for integrating moral discourse into the current law school curriculum through ethics and moral reasoning skills development is by adopting an approach similar to the one used by William and Mary Law School in the United States as discussed earlier in this section.<sup>1176</sup> A similar approach is also used by Vermont Law School, also in the United States, the difference being that while

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<sup>1173</sup> Felix Frankfurter, cited in Rand Jack and Dana Jack, *Moral Vision and Professional Decisions: The Changing Values of Women and Men Lawyers* (1989) (“In the end, the law is what the lawyers are. And the law and the lawyers are what the law schools make them.”)

<sup>1174</sup> Luban, above n 1130, 169-178.

<sup>1175</sup> See the discussion above about Kohlberg’s stages of moral development and its impact on an individual’s moral development as they progress through law school. This again is another rich area for research.

<sup>1176</sup> See also Chapter 2, Section 2.5.4 (Research on Legal Ethics) for a detailed discussion of Moliterno’s study and the approach used by William and Mary Law School for legal ethics skills training); Moliterno, above n 453, 259.

William and Mary's program is mandatory, Vermont Law School's General Practice Program (GPP) is voluntary and restricted to a select group of students.<sup>1177</sup> In Australia, the Queensland University of Technology is recognised as one of first law schools to embrace the challenge of integrating legal and generic skills training with traditional legal theory and black-letter law training by adopting a 'a co-ordinated and incremental approach to developing...knowledge and skills.'<sup>1178</sup> These types of programmes ensure that substantive law and ethical issues are addressed together.

A second option for integrating moral discourse into the current law school curriculum through ethics and moral reasoning skills development is to increase the number and quality of clinical practice programmes that are *required* during one's legal education and to fully integrate these programmes into the core and specialised law school curriculum.<sup>1179</sup> The purpose of these clinical practice courses is to integrate theory with practice and to continually reinforce not only basic legal skills of proper research, writing, case analysis, legal reasoning and argument but to also consistently reinforce the proper negotiation and ethics aspects of nearly every legal issue, whether it is in a criminal or non-criminal context.<sup>1180</sup> The benefit of this type

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<sup>1177</sup> Note: Comments on Vermont Law School's General Practice Program is based on personal experience.

<sup>1178</sup> Keyes and Johnstone, above n 1136, 537 (discussing the law curriculum changes and approach used by Queensland University of Technology among others); Sharon Christensen and Sally Kift, 'Graduate Attributes and Legal Skills: Integration or Disintegration' (2000) 11 *Legal Education Review* 207; Sally Kift, 'Harnessing Assessment and Feedback to Assure Quality Outcomes for Graduate Capability Development: A Legal Education Case Study' (2000) (Paper presented at the Australian Association Research in Education Conference); Rachel Spencer, 'Teaching Legal Skills at Flinders – An Integrated Practical Legal Training Program' (2003) 6 *Flinders Journal of Law Reform* 217.

<sup>1179</sup> Cf Condlin, above n 43 (providing a good historical account of how clinical education was introduced into the mainstream of legal education and arguing that the current clinical legal education program, especially in the area of legal ethics, fails to guide students properly in dealing with the most common ethical dilemmas faced by practitioners). I would agree with Condlin in regards to legal ethics. I disagree about its failure in total and argue that it can certainly be improved.

<sup>1180</sup> I use the terms criminal and non-criminal context in reference to Kronman's argument that perhaps legal ethics may be different in criminal context as opposed to non-criminal contexts because they

of structure is to prepare law students to be effective, ethical, and contributing lawyers and to engrain them in a legal culture that is consistent with practice, consistent with the values of the legal institution, and consistent with the goals of the justice system in serving the public even as it serves both business and personal interests.<sup>1181</sup>

For example, given the prevalence and mandatory use of alternative dispute resolution (ADR) mechanisms in practice, ADR courses, along with the courses discussed under the ethical standard setting section, should be considered core subjects and required for every graduating law student and those entering the profession. These ADR courses should be considered core subjects because incoming law students need to be indoctrinated<sup>1182</sup> in seeing a clear and complete dispute resolution continuum from conciliation to court (or as I would call it, ‘conversation-to-litigation’) in terms of dispute resolution options in the practice of law.<sup>1183</sup>

The second recommendation for integrating moral discourse into the current law school curriculum is to develop a new legal ethics curriculum that consists of two primary components taught in the first year of law school where foundational skills are established. These two components consist of the following: 1) a course in logic and reasoning; and 2) a course on comparative legal ethics with a focus on the legal ethics code of the prevailing jurisdiction. Each component of this second recommendation is discussed in further detail below.

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serve different interests. This is one way of looking at the issue of negotiation and legal ethics. See generally Kronman, above n 1086, 834.

<sup>1181</sup> Eyster, above n 977, 756-757 (“Only by making fundamental changes in the way we view our professional roles, and in the way we educate our professionals, can we achieve a satisfactory solution to the presently intractable dilemmas posed by common negotiation practice”).

<sup>1182</sup> See, eg, Chart, above n 899, 192-195 (defining ‘acculturation’ as “absorbing particular values and ways of responding to conflict; acquiring a professional--and ultimately a personal—identity” and arguing that the acculturation process “occurs not only through what we teach, but how we teach it and what we reward in our students.”)

<sup>1183</sup> See Chart, above n 899, 191.

The first component of a new legal ethics curriculum involves a course in logic and logical reasoning, to be taught in the first year of law school. The course in logical reasoning includes both inductive and deductive reasoning skills. *Logical reasoning*<sup>1184</sup> skills are specifically designed to assist in recognising and using inductive reasoning, deductive reasoning, abductive reasoning, defeasible reasoning, legal fallacy, and logical argument. Because logical reasoning is extracted from various disciplines,<sup>1185</sup> it allows legal and non-legal arguments to be based on a multi-disciplinary approach. This is invaluable given that in the course of legal practice, lawyers must engage and negotiate with various disciplines in establishing their client's case. This type of logical reasoning skills can also be used in dealing with ethical dilemmas to look more closely at some of the morally and ethically ambiguous situations that a future lawyer might find themselves in both on a personal and professional level.

For example, Chapter 2 introduced Lamb's anecdotal study that resulted in a set of approximately forty (40) real and practical ethical dilemmas that Australian lawyers face in the course of their practice in Queensland, Australia.<sup>1186</sup> Both Wetlaufer and Lerman also discuss negotiation-related ethical issues, including the use of deceptive tactics, faced by lawyers in the United States, and ways which these lawyers dealt with these issues.<sup>1187</sup> In addition, Wilkinson, Walker and Mercer's study of the use and effectiveness of legal ethics code in the Ontario, Canada jurisdiction includes a rich set of mini-transcripts of over 100 ethical scenarios faced

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<sup>1184</sup> See, eg, D Q McInerny, *Being Logical: A Guide to Good Thinking* (2005); Anthony Weston, *A Rulebook for Arguments* (2008); James H Kiersky and Nicholas J Caste, *Thinking Critically: Techniques for Logical Reasoning* (1995).

<sup>1185</sup> See McInerny, above n 1184, ix, 26-30 (discussing the basic principles of logic); Weston, above n 1184, Kiersky and Caste, above n 1184.

<sup>1186</sup> Lamb, above n 448, 217-234. See Chapter 2 (Review of Literature) for a more detailed discussion.

<sup>1187</sup> Wetlaufer, above n 31; Lerman, above n 60.

by lawyers in the Ontario jurisdiction.<sup>1188</sup> By applying the logical reasoning skills to such practical ethical scenarios, law students and future legal practitioners can begin to develop and cultivate good judgment.

The second component of a new legal ethics curriculum involves a course in comparative legal ethics, to be taught in the first year of law school. The course in comparative legal ethics is essentially an extended, modified version of the legal ethics course currently taught in a majority of law schools as a higher-level required or elective course after the completion of first-year core courses. The legal ethics course should be built on the foundational teachings in logic and reasoning discussed above. The principle advantages of this comparative legal ethics course as compared with the manner in which it is generally taught today are two-fold. First, the comparative legal ethics course would entail a comparative analysis of various legal ethics codes instead of only focusing on the professional ethics code of the prevailing jurisdiction. This allows law students to analyse the professional ethics codes of their jurisdiction in relation to other jurisdictions in order to have greater understanding of its impact on the legal practitioner. The second benefit of a comparative legal ethics course is that lawyers will be able apply the logical reasoning skills to the ethical dilemmas they might face under various legal ethics codes, including the ability to distinguish between the role-morality of their profession, the general morality of society, and the potential conflict with their own personal ethics. These skills are even more applicable in the negotiation context where certain unwritten rules might apply and tactics such as bluffing, puffing, high first offers, low-balling and other potentially deceptive tactics are considered acceptable by negotiators in various

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<sup>1188</sup> Wilkinson, Walker and Mercer, above n 472, 657-678.



jurisdictions. Furthermore, these fully integrated and well-rounded skills can be applied across all the important areas of a legal professional's life.

In conclusion, this subsection discussed the third ethical standard setting reform proposal by recommending the integration of in-depth ethics and moral reasoning education into the current law school curriculum.

In summary, the three ethical standard setting reform proposals discussed in this section 7.4 complement the legal regulations reforms discussed in section 7.3. Together, these reform proposals can work to encourage the establishment of a consistent set of standards that can be followed by legal professionals in carrying out their professional duties. By removing ambiguity and inconsistency and, at the same time, providing clarity in areas such as negotiations and the use of certain deceptive tactics in negotiation, the reform proposals to date can pave the way towards greater harmony between thinking like a lawyer and being an ethical lawyer as well as encouraging greater consistency between what is taught and what is practiced. The final link, however, must be through the integration of both the legal regulation reforms and ethical standard setting reforms into the institutions that support and regulate the profession as a whole. This integration can be accomplished by implementing the institutional design reforms discussed in the next section.

## **7.5 INSTITUTIONAL DESIGN REFORMS**

This section deals with two key proposals for institutional design reforms. In the context of this thesis, institutional design refers to an institutional environment that is conducive to fostering the ideals and goals of the legal regulation reforms and ethical standard setting and compliance proposals outlined in the prior subsections.<sup>1189</sup>

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<sup>1189</sup> Coady and Sampford, above n 200, 11.

In looking at the ideals and goals of legal regulations and ethical standard setting, institutional design reforms constantly ask the questions of ‘what structure, what design, what kinds of relationships between members of an organisation are likely to aid the institution in achieving the values that justify its privilege of incorporation’,<sup>1190</sup> and therefore more positively achieve what it is designed to accomplish.

In the context of the legal system in general, the desired result is justice for parties to a dispute. In the context of legal education, the goal is preparing law students to be practicing lawyers so that they may serve the larger goal of achieving justice within the legal system through resolution of disputes.<sup>1191</sup> Taken one step further, the aspired result of a negotiation is an agreement between the parties as a result of having achieved a sense of justice and satisfaction of personal interests, termed by some as the ‘good outcome’.<sup>1192</sup> As discussed earlier, these goals may or may not be achievable within the current adversarial legal system and an institutional design that fosters the teaching of an adversarial legal system. Therefore, in order to successfully implement the legal regulation and ethical standard setting reform proposals discussed in prior sections, the institutional design reforms address the structural changes that must take place within the profession, education systems, and legal systems in order to support other integrated reform proposals.

The institutional design reforms proposed in this section are based on the philosophy that sometimes complex issues such as lawyers’ deceptive conduct in

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<sup>1190</sup> Coady and Sampford, above n 200, 15 (explaining further that this also means “looking at some of the aberrations that prevent it achieving those values.”).

<sup>1191</sup> Note: This is certainly another area ripe for research in terms of clearly defining measurable goals and outcomes of law schools and law school graduates. An example is the law graduates professional ethics readiness survey conducted by Moliterno at William and Mary Law School in the United States. See Moliterno, above n 453, 259. Another example is conducting incoming and exit surveys measuring a student’s perceived readiness to conduct various legal skills, analysis, and writing tasks necessary for incoming practitioners.

<sup>1192</sup> Patton, above n 1105, 285-286.

negotiations are not individual issues but symptomatic of the institutional design, structure, and culture in which such behaviours occur. An incremental change in the institutional design may encourage a monumental change in behaviour thus creating a ripple effect on the behaviour of lawyers and the perception of lawyers and the legal profession in the eyes of the public it is meant to serve.

#### **7.5.1 Proposal 1 – Reform the Legal Ethics Code Enforcement Mechanism**

The first institutional design reform proposal is aimed at the legal ethics code enforcement mechanism, namely the professional bodies assigned to the tasks of bringing ethics violation charges where a legal practitioner is alleged to have run afoul of the legal ethics code of the jurisdiction.<sup>1193</sup> Two primary areas are worthy of further scrutiny and reform specifically as they relate to a lawyer's potentially deceptive conduct in negotiations.

First, assuming that the legal ethics code includes negotiation as a primary function of lawyers as recommended in Section 7.3.1, this distinction should become part of how legal ethics cases are heard and decided. The first part of amending the legal ethics enforcement mechanism extends to beyond negotiation and recommends that there be more sensitivity and analysis of ethics violation cases based on the context of the alleged violation of the legal ethics code. By context, I am specifically talking about the role or function of the lawyer at the time of the alleged violation. For example, if the lawyer, at the time of the alleged violation, was a mediator, negotiator, or trial advocate, there should be relevant standards by which his/her

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<sup>1193</sup> Rhode, above n 151, 19-20, 211 (“major challenge is to build a more coherent system that balances the needs for public accountability with professional autonomy”; “our current one-size-fits-all model of legal education and professional regulation badly needs revision”; “profession needs to develop more effective and accountable disciplinary structures”).

conduct is measured and assessed in light of the alleged violation. This is not to diminish the public interest standard. It is to complement the public interest standard by ensuring that all relevant information and perspectives are taken into account when judging whether an attorney has violated the legal ethics code of a particular jurisdiction. This is especially important in the area of negotiations because, as established earlier, there is a lack of consistent standards of behaviour within a jurisdiction as well as across jurisdictions.<sup>1194</sup>

For example, in Chapter 4, after conducting an analysis of the legal ethics cases in Queensland where the alleged violation was deceptive or misleading conduct in the context of negotiation,<sup>1195</sup> the results revealed that the context and function of the lawyer in which the alleged violation occurred was not considered and was not a key factor in the final decision. I do not argue that deceptive or misleading conduct should be excused depending on the context or circumstances; however, I do recommend that this contextual factor be seriously considered in determining the final guilt or innocence of the alleged offender as well as the relevant punishment.

The legal ethics code for Queensland, as well as most common law jurisdictions, provide for specific punishment or set of punishments for violating the provisions of the legal ethics codes. In the case of Queensland, for example, the primary rationale for finding a lawyer guilty and punishing the offending lawyer is

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<sup>1194</sup> Bordone, above n 96, 3 (“Though separate ethics rules exist for lawyers who mediate or arbitrate, there continues to be no separate ethical rules for lawyers engaged in the process of negotiation...”); Eyster, above n 977, 773 (“structural features designed to guarantee procedural and outcome fairness when lawyer is an advocate are “totally absent in the negotiation process”); Mize, above n 66, 247 (“More guidance needs to be given on acceptable negotiating behaviour.”); Daigneault and Marshall, above n 1097, 18 (“Negotiation is an area that the legal community has failed to define, analyse, and codify adequately. Attorneys are left to blindly navigate its muddy waters at their own peril.”).

<sup>1195</sup> Please see Chapter 5 (Analysis of the Success of Professional Ethical Codes of Conduct of Queensland in Controlling Lawyers’ Deceptive Behaviour) as well as the charts in the Appendices for further discussion and information on this qualitative study.

based on a protection of public interest regardless of surrounding or mitigating circumstances.<sup>1196</sup> In addition, while the resulting punishment seems consistent with the provisions of the legal ethics code, the punishment, in many cases, seems inconsistent, highly onerous and punitive relative to the offence, the function of the lawyer at the time of the alleged violation, and the context in which the alleged conduct occurs. There appear to be more strike-offs and punitive fines than an attempt for restorative or remedial justice measures.<sup>1197</sup> In the ten years of cases studied where the alleged offence was misleading or deceptive conduct, there is little to no information on whether the alleged violation occurred in the context of a trial, a court appointment, a meeting or a negotiation; however, this can be discerned implicitly from a more detailed review of the cases.<sup>1198</sup>

A second area of reform related to the legal ethics code enforcement mechanism is aimed specifically at clarifying the degree of severity of the offending conduct, such as misleading or deceptive conduct in negotiations, in relation to other violations of the legal ethics codes. First, a review of ethics violation cases must determine if the misleading or deceptive conduct occurred in the context of a negotiation and whether it falls within the spectrum of offending conduct. This is especially the case if the profession continues to judge lawyer behaviour when the lawyer is serving as negotiator under the same standards as when the lawyer is an

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<sup>1196</sup> See, eg, *Mellifont* (1981) Qd. R. 17 Andrews J (with the concurrence of Connolly J at 30 (“The public interest calls for effective vigilance over members of the profession and its standards of professional behaviour and great concern to ensure as well as possible that the public may confidently place their business and affairs in its hands.”)); See also *re Maraj* (1995) 15 WAR 12; *Cf Bolton v Law Society* [1994] 2 All ER 486

<sup>1197</sup> Haller, above n 928, 70 (arguing that professional discipline imposed primarily for the purpose of maintaining the profession’s reputation can cause more harm than good, especially where it intersects with issues of trust and public perception).

<sup>1198</sup> See Appendices for further information on these cases.

advocate, third-party neutral, and judge, whether explicitly, implicitly by conduct, or by silence.

An example of the impact of not having an objective spectrum of offending conduct in the area of misleading or deceptive conduct is most clearly illustrated by *QLS Inc v Craig Stephen Bax*,<sup>1199</sup> a case of the Court of Appeal, Supreme Court of Queensland. The judge found that the solicitor failed to explain his actions properly, did not display remorse, and continued with the offending deceptive conduct in a persistent manner.<sup>1200</sup> As a result of this behaviour, the Court of Appeal affirmed the Tribunal's guilty finding, struck the solicitor off the role of solicitors, and ordered him to pay costs.<sup>1201</sup> However, Pincus AJ disagreed with the majority's decision. Pincus AJ indicated in his dissenting opinion that 'dishonesty, like other forms of misbehaviour, has grades of seriousness',<sup>1202</sup> and that the solicitor in this case had not committed the gravest form.<sup>1203</sup> Unfortunately for the solicitor, Pincus AJ did not elaborate on the grades of dishonesty that fall within or outside the bounds of violating the professional ethics codes. As a result, the aggravating factors combined with the fact that there is not an explicit list of the 'grades of seriousness' for dishonesty meant that the judges could only rely on the legal ethics rules and existing case law to determine the final outcome.<sup>1204</sup> This is not to say that dishonesty should

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<sup>1199</sup> *QLS Inc v Craig Stephen Bax* [1998] QCA 089 ('Craig Stephen Bax').

<sup>1200</sup> *Craig Stephen Bax* [1998] QCA 089, 4, 6-7, 13-15.

<sup>1201</sup> *Craig Stephen Bax* [1998] QCA 089, 18.

<sup>1202</sup> *Craig Stephen Bax* [1998] QCA 089, 13.

<sup>1203</sup> *Ibid.*

<sup>1204</sup> *Craig Stephen Bax* [1998] QCA 089, 13 (Pincus, JA) ("...it appears that what the solicitor did was unwisely succumb to the temptation to assist, by fraudulent means, a client facing bankruptcy. It was not suggested against him that he derived any personal benefit - except such general benefit as may be obtained from achieving a satisfactory result for a client."). This again highlights the tension in the duties of a lawyer as profession, the need for better standards for assessing violations, and the importance of educating lawyers on how to manage these issues so as to avoid ethics violations proceedings.

be fully condoned. This case is illustrative of the point made by many practitioners and scholars that the ethics codes alone do not provide sufficient consistent guidance in adjudicating cases of this type.<sup>1205</sup> This is especially so for cases involving negotiations as illustrated by the *Mullins* case<sup>1206</sup> where the barrister was found guilty of misleading and deceptive conduct but only received a fine, a result quite inconsistent with *Bax*.

In summary, by implementing this first institutional design reform proposal and aligning the enforcement mechanism of ethics violations with more consistent and objective standards, the profession can ensure an effective and accountable disciplinary structure that accomplishes remedial goals (e.g. education) as well as maintaining the highest standards of the profession. The result, when measured, should be increased positive public perception of lawyers and the legal profession.

#### **7.5.2 Proposal 2 – Adopt More Formal Mentoring and Research Partnerships Between Professional and Educational Bodies**

The second institutional design reform proposal focuses on the relationships between law practitioners, professional organisations, and educational institutions. The second institutional design reform proposal recommends adopting formal mentoring and research partnerships between the profession and legal academia.

The primary area of enquiry here is whether there is sufficient integration, interdependence, and interrelationships between major stakeholders so as to ensure seamless development and education of future lawyers who are able to balance both

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<sup>1205</sup> See, eg, Daigneault and Marshall, above n 1097, 18; Wilkinson, Walker and Mercer, above n 472, 645; Rhode, above n 151, 211.

<sup>1206</sup> See Chapter 5, Section 5.9.2 for a detailed analysis and discussion.

professional and personal obligations.<sup>1207</sup> There is a variety of criticism that law schools do not effectively prepare students for law practice. Even in law school, recent studies have shown that law students tend to develop or increase existing personality traits of perfectionism, duality and competitiveness to succeed in law school.<sup>1208</sup> Furthermore, as these traits are carried on to professional lives, lawyers appear to have a higher than average rate of health problems, including depression, alcoholism, and drug abuse.<sup>1209</sup>

This would tend to demonstrate that there is a ‘disconnect’ between the academic instruction of future lawyers and actual law practice as well as a lack of awareness within the educational and professional environments of the real pressures affecting lawyers, especially in dealing with ethical issues.<sup>1210</sup> By disconnect, I mean that what one is taught is not what one actually practices and vice versa. For example, law students may be taught in legal ethics to always be honest and fair, yet when they subsequently take a negotiations class or a commercial transactions class or actually practice law, a series of events or conversations or lessons will make it clear that the

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<sup>1207</sup> See, eg, Macfarlane and Manwaring, above n 465; *Craig Stephen Bax* [1998] QCA 089; Chart, above n 899, 177; Eyster, above n 977, 752; Berkovic, above n 963, 1 (stressing the importance of the profession and education institutions to work more closely).

<sup>1208</sup> See Berkovic, above n 963, 1. See also Keyes and Johnstone, above n 1136, 537 (discussing the central issue of law school curriculum in Australia and citing Zimmerman who observed that ‘the root of institutional concern [about the use of group work] lies in four notions embedded in traditional legal education: competitiveness, teacher control, authorship/individualism, and individualized grading’); Clifford Zimmerman, ‘“Thinking Beyond My Own Interpretation”: Reflections on Collaborative and Cooperative Learning Theory in the Law School Curriculum’ (1999) 31 *Arizona State Law Journal* 957,986; Helen Brown, ‘The Cult of Individualism in Law School’ (2000) 25 *Alternative Law Journal* 279, 287.

<sup>1209</sup> Berkovic, above n 963, 1; P J Schiltz, ‘On being a happy, healthy, and ethical member of an unhappy, unhealthy, and unethical profession’ (1999) 52(4) *Vanderbilt Law Review* 869-951. See also Judith McNamara, Rachael Field, Catherine Brown, *Learning to Reflect in the First Year of Legal Education: The Key to Surviving Legal Education and Legal Practice* (2009) (discussing the statistics of discontent and health problems plaguing the profession and recommending the use of reflective practice in the law school curriculum and in law practice as preventative measures). This unpublished paper is on file with the author.

<sup>1210</sup> See, eg, Keyes and Johnstone, above n 1136, 537 (discussing the relationship of and issues between legal academy and the legal profession in Australia).



way to behave is dishonestly, sometimes unfairly, and in a highly competitive manner. As discussed in Chapter 6, the legal profession is a demanding and honourable profession yet it is also perceived as greedy and dishonourable.<sup>1211</sup> If lawyers are considered analogous to doctors in terms of reputation, high professional ethics, and service to society, why do doctors and the medical profession as well as judges fare better in consumer and industry studies of the legal profession than lawyers?<sup>1212</sup>

One option for addressing this seeming disconnect between the various stakeholders of the legal profession is by engaging in greater empirical research of lawyers, lawyer behaviour, and the legal profession so that the profession could benefit from the findings of relevant research.<sup>1213</sup> This would aid in reducing the problems that plague the profession and the constant negative perception of the legal profession in the eyes of the public. Out of any other professions mentioned to date, the legal profession, charged with protecting the public interest as well as their client's interests, needs to lead the way to possible professional reform.

A second option for addressing this issue between the various stakeholders of the legal profession is by creating partnerships with local law firms or community law practices. This recommendation is slightly different from those discussed in Section 7.4.3. The ethical standard setting proposal discussed in Section 7.4.3 involved recommendations for integrating ethics and moral reasoning training in each of the core law school courses in a simulated law practice environment. This institutional

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<sup>1211</sup> See Chapter 6 (The Foundation for Change) for an in-depth discussion and analysis of consumer studies regarding the perception of lawyers and the legal system, especially in the United States. Perspectives from Australia and other jurisdictions are also discussed.

<sup>1212</sup> See Chapter 6 (The Foundation for Change) for an in-depth discussion and analysis on this topic.

<sup>1213</sup> Keyes and Johnstone, above n 1136, 537 (advocating for a “more mature ‘consultative and respectful’ relationship, in which the function of the academy is regarded as significantly broader than the preparation of graduates for private practice, and the production of research of utility to practitioners and judges.”).

design reform proposal, however, involves a law student undertaking apprenticeship training at local or community law practice firms.<sup>1214</sup>

Historically and prior to the introduction of clinical legal education, lawyers were trained through an apprenticeship at a law firm.<sup>1215</sup> This proposal involves the integration of legal education and apprenticeship. The difference is in the degree of integration, the degree of real law practice and a greater sense of reality in terms of what law practice is actually like. Under this approach, local practitioners are continually engaged with the law school to mentor upcoming lawyers.

A third option to address this issue and increase collaboration between the legal academy and professional practice is to create legal clinics on the grounds of each law school. This option is different from law students attending apprenticeship training at external law firms as discussed above. Legal clinics can be stand-alone, revenue generating enterprises such as those at, for example, Vermont Law School and Stanford Law School. Legal clinics can and should also be connected with research centres of excellence. These legal clinics provide ways for all key stakeholders of the legal community to join with academia and create an environment where the best in academia, law practice, and community organisations come together to serve real clients while integrating theory and practice in one setting. In addition, these legal clinics provide a rich venue in which to conduct empirical research, an activity that needs to be more fully integrated into legal academia and law practice.

A key benefit of establishing legal clinics at or near the law school ensures that law students have a forum in which to apply what they are learning in class,

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<sup>1214</sup> Condlin, above n 43, 318-320 (providing a historical perspective of clinical legal education and the apprenticeship model).

<sup>1215</sup> Ibid.

integrate classroom learning with practical experience, engage in mentoring relationships with practicing attorneys and contribute to resolving real disputes in a real-time setting. This also allows both the faculty and practicing attorneys to gauge a student's progress and provide a realistic, positive mentoring so as to reward positive behaviour, encourage potential behavioural adjustments for greater professional success, or reinforce substantive knowledge at the most foundational level. As stated earlier, lay persons begin the journey to being future practicing lawyers at law school. To the extent that law school can take the initiative to begin or continue to shape the legal and moral development of practitioners towards greater maturity is the extent to which lawyers can be successful practitioners. The result is a greater chance that graduating law students will uphold the values and goals of the profession in practice.

In conclusion, this section recommended two effective institutional design reforms aimed at ensuring that the legal regulation and ethical standard setting reforms discussed in prior sections have the greatest chance of success in addressing the issue of deception in negotiation. Institutional design reforms aimed at improving that journey from start to graduation is one of the best and most effective means of reversing a cycle of potentially unethical or unworthy professional behaviour, including potentially deceptive behaviour in negotiation. Changing behaviours and perceptions which have been engrained for so many years as part of a dominant legal culture may seem impossible; however this is no longer so impossible as to risk remaining with the status quo. Change is possible and change must happen.

## **7.6 IMPLEMENTING BEHAVIOUR CHANGES GENERALLY**

The purpose of this section is to introduce ways in which the reform proposals discussed above can be implemented to address the issues highlighted by the research

questions in this thesis. One of the key aspects of the question of lawyer deception in negotiation is that it involves the behaviour of lawyers in a particular setting, behaviour which may be hard to see, measure, or change. In addition, other issues identified throughout this thesis, such as through the comparative study of legal ethics codes in Chapter 4 and a study of the ethics violation cases in Chapter 5, reflect a need for behavioural changes which can be fostered through the implementation of the reform proposals outlined in prior sections.

Changing behaviour is hard for any ordinary person. Changing the behaviour of lawyers may seem impossible given such a rich history and engrained culture generally consisting of competitiveness, adversarialism, winning, zealous representation, confidentiality, and partisanship. Changing the behaviour of a large group to the extent that there is sufficient impact on society and the profession itself can be a challenge. However, changing behaviour is possible by understanding existing theories of behaviour modification and strategically using certain models that aid in effective change.

From a policy and behaviour modification perspective, there are several theories for changing behaviour. This section will introduce and discuss current theories of encouraging behavioural changes as a means of showing that there are several options available to key stakeholders for undertaking successful, effective, and measurable reform. This section will also recommend some policy and behavioural change theories that would appear to be beneficial in addressing the issues raised in this thesis. More importantly, the purpose of this section is to stress that it is no longer an option to avoid or sideswipe the issue, especially as there are many ways to address it.

To date, *rational choice theory* has dominated policy making, legal decision-making, and pervaded other areas of society. Rational choice theory is based on the assumption that people will assess the choices available to them, determine the costs and benefits of each available choice, and make a rational choice that yields the highest net benefit.<sup>1216</sup> The standard tools of public policy to change behaviour under the rational choice model are now well-known: ‘sanctions (fines and other penalties), price signals (taxes, financial incentives) and the provision of information.’<sup>1217</sup> However, as discussed in Chapter 2, the rational choice model has limitations, which are addressed through prospect theory and the frivolous framing theory discussed in Chapter 2, section 2.3.7.<sup>1218</sup> The rational choice model and its derivatives are the most common models used in the legal reforms area. In addition to these theories, behavioural change can also be implemented using other theories.

Behavioural change at the *individual level* can be influenced through theories of conditionality, classical conditioning, cognitive consistency theory, social cognitive theories, and heuristics and biases.

*Conditionality* means changing behaviour through rewarding or punishing the consequences of the behaviour.<sup>1219</sup> *Classical conditioning* involves rewarding or punishing behaviour based on an association with different stimuli.<sup>1220</sup> *Cognitive consistency theory* encourages behavioural change by making associations between the desired change and the individual’s values and beliefs, ensuring there is

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<sup>1216</sup> Australian Public Service Commission, *Changing Behaviour: A Public Policy Perspective* (2007) 7 <<http://www.apsc.gov.au/publications07/changingbehaviour.pdf>> at 9 August 2010; Gary S Becker, *The Economic Approach to Human Behavior* (1976); David Hume, *A Treatise of Human Nature* (1888).

<sup>1217</sup> *Changing Behaviour: A Public Policy Perspective*, above n 1216, 7.

<sup>1218</sup> Please see Chapter 2, section 2.3.7 (Decision-Making Theories Affecting Legal Negotiation) for a detailed discussion. See also Guthrie, above n 265; Rachlinski, above n 269, 121.

<sup>1219</sup> *Changing Behaviour: A Public Policy Perspective*, above n 1216, 9-12.

<sup>1220</sup> *Ibid.*

consistency, so that the individual is more likely to adopt the change on a long-term basis. *Social cognitive theories* emphasise individual self-empowerment and self-confidence through small goals, reinforcement, and monitoring.<sup>1221</sup> Finally, *heuristics and biases* at the individual level, such as anchoring, scarcity, loss or gain, and peak experience influence the degree to which there is a consistent bias in decision-making.<sup>1222</sup>

With regards to lawyer's use of deception in negotiation, heuristics and biases as well as cognitive consistency theory can play a role in decision-making. In Chapter 2, Lee et al's 2004 study<sup>1223</sup> emphasised the difference between pro-social deeds (e.g. truth-telling) and anti-social deeds (e.g. telling lies) and how they can be influenced by culture. In the context of the legal system and the use of deception in negotiation, the legal system, through the legal ethics codes studied in Chapter 4, can be considered a culture that rewards pro-social deeds (e.g., honesty and candour) yet the individual lawyer's success is based on using anti-social deeds (e.g., deception) in negotiations. As the results of the comparative study of legal ethics codes in Chapter 4 indicate, the legal system has not created any strong positive or negative associations between using deception in negotiation and the resulting negative consequences. As such, consistent with prospect theory, deception in negotiation is *not* viewed as a high-risk behaviour to the extent that it deters practitioners from using it to gain an advantage.

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<sup>1221</sup> *Changing Behaviour: A Public Policy Perspective*, above n 1216, 10-11.

<sup>1222</sup> See Amos Tversky and Daniel Kahneman, 'Judgment Under Uncertainty: Heuristics and Biases' in David Halpern et al, *Personal Responsibility and Changing Behaviour: The State of Knowledge and Its Implications for Public Policy* (2004) 24

<<http://www.cabinetoffice.gov.uk/media/cabinetoffice/strategy/assets/pr2.pdf>> at 9 August 2010; Korobkin and Guthrie, above n 79; Guthrie, above n 1032.

<sup>1223</sup> See Chapter 2, Section 2.5.2 (Research About Deception/Lying) for a detailed discussion about Lee et al's studies on this topic.

To alter this behaviour at the individual level, the profession could implement the legal regulation and ethical standard setting reforms to create a consistency in the values and beliefs of legal practitioners. Then, cognitive consistency as well as social cognitive theories can be used to associate the desire for behaviour consistent with these values by rewarding the desired behaviour. Consequently, legal practitioners may achieve a certain level of self-empowerment and self-confidence that reinforces the notion that the benefits of *not* using deception in negotiation are greater than those derived by adopting deceptive tactics in negotiation.

In addition to influencing behavioural change at the individual level, there are several theories of behaviour modification at the *inter-personal level*. These include authority theories, reciprocity and mutuality, face-to-face approach, and inter-personal heuristics and biases.

*Authority theory* is based on the view that people will comply and change behaviour if told to do so by someone whom they admire or feel is legitimate on the basis of a social role, expert opinion, or reward and punishment.<sup>1224</sup> For example, teachers, managers, partners, or entertainment and sports heroes may fall under this category of influential authority figures. *Reciprocity and mutuality theories* attempt to influence behavioural change through mutual gain or reciprocated favours.<sup>1225</sup> Both reciprocity and mutuality are generally used in conjunction with cognitive consistency and conditionality theories discussed above. A *face-to-face approach* can be used to increase commitment to behavioural change.<sup>1226</sup> This approach is effective when combined with the authority theory. Finally, *interpersonal heuristics and*

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<sup>1224</sup> *Changing Behaviour: A Public Policy Perspective*, above n 1216, 13-16.

<sup>1225</sup> *Ibid.*

<sup>1226</sup> *Ibid.*

*biases* can also influence behavioural modification goals.<sup>1227</sup> Since heuristics and biases are mental shortcuts that occur automatically, any behavioural modification program must take into account such factors as attribution error,<sup>1228</sup> inter-group bias,<sup>1229</sup> false consensus,<sup>1230</sup> and false uniqueness.<sup>1231</sup>

With regards to addressing the issue of lawyer deception in negotiation at an inter-personal level, the current standard conception model of ethics<sup>1232</sup> seems to indicate that attribution error, inter-group bias, and false uniqueness are the likely heuristics and biases that must be taken into consideration when developing an effective change program. Legal practitioners, as a largely self-regulated profession, are likely to disproportionately agree with their own group's view of issues such as deception in negotiation and discount the views of external groups who contend that lawyers are deceptive in negotiations. In addition, due to the competitive nature of an adversarial legal system, lawyers are likely to overestimate their own skills at the expense of another or blame external factors rather than taking personal responsibility for unsuccessful or less than optimal outcomes in negotiations.

Given the structure of most law firms and legal services organisations, a combination of authority theory and face-to-face approach can be used to curtail deception in negotiation. For example, as research by Lerman, Lamb, Macfarlane and

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<sup>1227</sup> *Changing Behaviour: A Public Policy Perspective*, above n 1216, 16; See also David Halpern et al, above n 1222, 27.

<sup>1228</sup> *Changing Behaviour: A Public Policy Perspective*, above n 1216, 16 (defined as "tendency to over-emphasize dispositional factors about people and under-emphasise situational factors").

<sup>1229</sup> *Changing Behaviour: A Public Policy Perspective*, above n 1216, 16 (defined as "tendency for people to flatter themselves...and underestimating their peers' abilities").

<sup>1230</sup> *Changing Behaviour: A Public Policy Perspective*, above n 1216, 16 (defined as tendency to "overestimate the extent to which other agree with their own opinion" thus providing false consensus of one's own personal opinion).

<sup>1231</sup> *Changing Behaviour: A Public Policy Perspective*, above n 1216, 16 (defined as "tendency for people to flatter themselves...and underestimating their peers' abilities").

<sup>1232</sup> See Chapter 2, Section 2.3.3 (Theories of Legal Ethics) for more information on this topic.



Manwaring, and Wilkinson et al shows,<sup>1233</sup> lawyers tend to place greater emphasis on the advice given by partners and senior practitioners than on the actual ethics codes when faced with specific ethical dilemmas. Therefore, at the interpersonal level, law firm partners, senior legal practitioners, and judges can play a key role in encouraging behavioural changes.

A final set of theories which can be leveraged to influence behavioural modification is aimed at the *group level*. Behavioural modification at the group level can be accomplished by using social capital theory, diffusion of innovation, tailoring messages and information, and the social marketing approach.

*Social capital theory* works on the basis of creating and using social networks and social norms to increase social cohesion and spread the message for desired skills and behavioural changes.<sup>1234</sup> *Diffusion of innovation theory* encourages behaviour modification by using influential people, organisations, and partnerships with key groups to spread behavioural change messages in innovative ways.<sup>1235</sup> *Tailoring messages and information* is especially relevant and useful when behavioural change must be targeted towards demographically or culturally distinct groups,<sup>1236</sup> such as legal practitioners. Finally, the *social marketing approach*, developed by Kotler and Lee,<sup>1237</sup> is focused on ‘influencing behaviours that will improve social outcomes such

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<sup>1233</sup> See Chapter 2, Section 2.5.4 (Research About Legal Ethics) for more information on this topic. See also Chapter 3, Section 3.2 (Lawyers Deceiving Clients) for more information on Lerman’s study.

<sup>1234</sup> *Changing Behaviour: A Public Policy Perspective*, above n 1216, 17-20 (defining ‘social capital’ as consisting of “networks, norms, relationships, values, and informal sanctions that shape the quantity and cooperative quality of a society’s social interactions.”).

<sup>1235</sup> *Changing Behaviour: A Public Policy Perspective*, above n 1216, 17-20; See also S Godin, *Unleashing the Idea Virus* (2002); J Collins et al, *Carrots, Sticks and Sermons* (2002) 17.

<sup>1236</sup> *Changing Behaviour: A Public Policy Perspective*, above n 1216, 17-20

<sup>1237</sup> *Changing Behaviour: A Public Policy Perspective*, above n 1216, 21-28; P Kotler and N Lee, *Marketing in the Public Sector: A Roadmap for Improved Performance* (2006) 193-211 (discussing the twelve (12) principles underlying the social marketing approach to influencing behavioural change).

as improving health or improving injuries” thus improving overall quality of life.<sup>1238</sup>

The changed behaviours are meant to improve the individual and the environment, resulting in newly established social norms.<sup>1239</sup>

In the context of addressing the issue of deception in negotiation at the group level, the social marketing approach combined with tailoring messages to the culture of the legal system might work to increase awareness of the impact of using deception in negotiation as well as ways to sustain pledges for behavioural modification.

In addition to the individual, inter-personal, and group approaches to behavioural modification discussed above, there are also a number of other theories of behavioural change proposed by economists, social scientists, and psychologists. One of the most well-known of these are a set of principles developed by Dale Carnegie<sup>1240</sup> based on the work of contemporary psychologist B F Skinner. These principles are based on a positive reinforcement approach rather than the more common negative reinforcement approach (punishment) of the most behavioural change models. As these principles appear to overlap with those of the social marketing approach above, they are not discussed in detail here. Attempts to change behaviour may be different within a specific context, such as negotiating with an opponent only one time versus negotiating with a particular person on a repeated basis.<sup>1241</sup> Furthermore, behavioural changes can also be reinforced through the

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<sup>1238</sup> *Changing Behaviour: A Public Policy Perspective*, above n 1216, 21.

<sup>1239</sup> *Ibid.*

<sup>1240</sup> See generally, Dale Carnegie, *How to Win Friends and Influence People* (1987).

<sup>1241</sup> Carrie Menkel-Meadow, ‘Is Altruism Possible in Lawyering’ (1992) 8 *Georgia State University Law Review* 385, 397-398 (discussing the application of Robert Axelrod’s experiments to negotiation behaviours, discovery and disclosure behaviours in law). See also Robert Axelrod, *The Evolution of Cooperation* (1984).

influence of parents or other adult role models<sup>1242</sup> as well as socio-cultural factors, such as being identified as part of a ‘globalized’ humanity rather than a ‘particularised’ humanity, causing one to adopt behaviours or change them based on the extent of role or socio-political identification.<sup>1243</sup>

So far, this section has laid out various theories of initiating behavioural change at the individual, interpersonal, and group or community level combined with an example of how some of these theories might be used to address the issues of deception in negotiation and to implement the policy reform proposals. In addition, the prior chapters have established the foundation for change and this chapter has identified and recommended certain reform proposals for managing that change. Now, I address the question of which behavioural change approaches might best be suited to address the issue of lawyer deception in negotiation and the issues identified by answering the related research questions posed in this thesis.

In 2004, Halpern and his colleagues in the U.K. Prime Minister’s Strategy Unit issued a discussion paper aimed at generating discussion on ‘imaginative thinking about how policies could be designed in the future’<sup>1244</sup> to accomplish the goals of government as requested or mandated by its citizens. One of the key areas was on the importance of personal responsibility and working in partnership with

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<sup>1242</sup> Menkel-Meadow, above n 1242, 398-399 (discussing social psychologist Eva Fogelman’s findings of the study of rescuers of Jews or collaborator regimes during World War II for determinants of altruistic behaviour in certain situations, especially where such behaviour was unlikely). See also Eva Fogelman, *Moral Heroes of Our Time: Christian Rescuers*, America 161 (December 9, 1989); Samuel P Oliner and Pearl M Oliner, *The Altruistic Personality: Rescuers of Jews in Nazi Europe* (1988).

<sup>1243</sup> Menkel-Meadow, above n 1242, 399 (discussing further studies on possible determinants of altruistic behaviour). See also Kristen R Monroe et al., ‘Altruism and the Theory of Rational Action: Rescuers of Jews in Nazi Europe’ (1990) 101 *Ethics* 103; Adam Smith, *The Theory of Moral Sentiments* (1759); Adam Smith, *The Wealth of Nations* (1776). Menkel-Meadows’s view is that Smith’s views are contradictory with regards to human behaviour and altruistic tendencies.

<sup>1244</sup> David Halpern et al, above n 1222, 3.

government to implement effective behavioural change because government cannot do it alone.<sup>1245</sup>

Halpern et al's emphasis on personal responsibility as a driver for behavioural change is central to my recommendations on implementing the policy reform proposals discussed in this Chapter given the high level of personal responsibility that practicing lawyers undertake in the course of their practice. The emphasis on personal responsibility also attempts to establish a new relationship between the state and the individual, where encouraging personal responsibility increases empowerment which, in turn, encourages behavioural changes towards desired results.

Halpern and his colleagues identified three key factors that are important to consider in recommending a course of action. First, major policy outcomes require 'greater engagement and participation from citizens'<sup>1246</sup> in the sense that individuals must be willing to change in order to create long-term improvements. Second, Halpern and his colleagues stress that 'there are strong moral and political arguments for protecting and enhancing personal responsibility'.<sup>1247</sup> In essence, government works better when its citizens are empowered to make decisions on their own best interests rather than decisions being imposed by government.<sup>1248</sup> Finally, behaviourally-based interventions rooted in personal responsibility are 'significantly more cost-effective [and better] than traditional service delivery'.<sup>1249</sup> Traditional service delivery presumably means that the government takes greater ownership for

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<sup>1245</sup> David Halpern et al, above n 1222, 6 (discussing the key pressures and factors that require government to focus on co-production and behavioural change approaches to accomplish policy goals).

<sup>1246</sup> David Halpern et al, above n 1222, 3.

<sup>1247</sup> Ibid.

<sup>1248</sup> Ibid.

<sup>1249</sup> Ibid.

providing the solution than the individual.<sup>1250</sup> This notion of encouraging more personal responsibility is consistent with the nature of the legal profession and views of legal scholars.<sup>1251</sup>

The legal profession and its practicing members are still generally self-regulated and, therefore, would seem more conducive to personal responsibility approaches to behavioural changes. In light of this view, I recommend a multi-level approach to addressing the central issues of this thesis by leveraging Dale Carnegie's underlying principle of positively influencing behavioural change and Halpern's recommendation of encouraging personal responsibility. The reason for recommending this multi-level approach is that the legal system is, by nature, a blame game, consequentialist, utilitarian, punitive, focused on past events, and geared towards a win-lose mentality.<sup>1252</sup> In order to successfully implement the tripartite policy reforms solution discussed in this chapter, it is important to frame the issues differently and to engage lawyers in a different way so as to yield honest opinions and effective outcomes.

As Carnegie and psychologists such as B F Skinner have observed that 'when criticism is minimised and praise emphasized, the good things people will do will be

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<sup>1250</sup> David Halpern et al, above n 1222, 8-9, 12-13 (showing people's opinions on the importance of personal responsibility versus government responsibility on key policy issues. Halpern et al state that "...people in [sic] Britain appear fairly comfortable with the balance that UK policy has generally struck between state and individual responsibility. In contrast, the publics of both USA and some Scandinavian countries have tended in recent years to favour a shift towards more individual responsibility, while the publics of Latin America, Japan and the Former Soviet Union have wanted to see their governments take more responsibility."). In seen in Figure 6, Canada is closely aligned with the United States while Australia is higher on personal responsibility yet still more comparable with Britain.

<sup>1251</sup> Rhode, above n 151, 209, 213 ("We need to socialize lawyers to accept more personal responsibility for their professional actions...working conditions....regulatory process"; "...challenge is to enlist both the public and the profession in reforms that reconnect the ideals and institutions of legal practice....").

<sup>1252</sup> Chart, above n 899, 191-196 (discussing the characteristics of legal education and the case method approach to legal education creates disharmony with how lawyers approach negotiations and how they are conducted).

reinforced and the poorer things will atrophy for lack of attention.’<sup>1253</sup> The legal profession, from the moment one enters law school, is rife with rules-veneration, competition, high stress, high expectations, and as reported more recently, low civility and collegiality among practitioners. Some of this might be attributed to economic competition as well as changes to the profession; however, the more likely reason is the culture of the legal profession. This can be counteracted with more encouragement and professionalism in the context of implementing reforms. Therefore, to encourage ethical negotiation behaviour, one must engage practitioners, encourage them to adopt pro-social behaviour, and praise them for such desired behaviour as much as possible – catch them doing something right and reward it.<sup>1254</sup>

The first recommendation of a multi-level approach to implementing the policy reform proposals discussed in this chapter involves conducting a structured, statistically-based empirical study aimed at determining the attitudes and perceptions of lawyers regarding the use of deception in negotiation, the importance of negotiation in their daily practice, the role of the legal ethics codes in helping them make ethical decisions, and the issues underlying any of these major areas, including whether lawyers felt they had received sufficient education to deal with these issues.<sup>1255</sup> These studies may involve using multiple assessment tools and can be extensions of those studies already discussed in this chapter or developed with a specific jurisdiction in mind. The purpose of this first recommendation is to engage the key stakeholders of the legal system, namely practicing lawyers, so as to produce evidence-based data

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<sup>1253</sup> Carnegie, above n 1240, 254 (quoting B F Skinner).

<sup>1254</sup> Note: This would be consistent with several of the behaviour modification theories discussed earlier such as conditionality, classical conditioning, and cognitive consistency where the legal practitioner believes that being honest as a lawyer is consistent with his/her personal beliefs.

<sup>1255</sup> See, eg, Avnita Lakhani, “Deception as a Negotiation Tactic: A Study of the Views and Perceptions of Practitioners” *Update* (October 2009). *Update* is a monthly publication of LEADR.

which can serve to determine the areas of greatest potential for immediate and positive reform.

The second recommendation of a multi-level approach to implementing the policy reform proposals discussed in this chapter is a readiness assessment of those individuals, groups, and organisations who might be the primary beneficiaries of the proposed changes. One way to conduct the readiness assessment is by understanding the stages of change<sup>1256</sup> that each major stakeholder might be in and adapting proposed changes in behaviour accordingly. For example, lawyers who are not cognisant of using deceptive tactics in negotiation or the impact of such behaviour may be in the pre-contemplation stage and need to see evidence of a problem first. In contrast, if law schools concur that the current legal education curriculum is insufficient to help incoming practitioners deal with ethical issues, they are at the contemplation stage and ready to move towards the preparation stage and plan for changes to the curriculum.

An effective example of how to use this readiness assessment approach is documented by Richard Wu<sup>1257</sup> in discussing an important reform to Hong Kong's legal education programme based on a commissioned review of Hong Kong's legal education system. The independent review of Hong Kong's legal education system was the first in over three decades and consisted of reviewing the legal education curricula against the Marre Report discussed earlier.<sup>1258</sup> The independent review

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<sup>1256</sup> David Halpern et al, above n 1222, 21-22, figure 8 (describing the stages of change); See also O J Prochaska and C C DiClemente, 'Stages and processes of self-change of smoking: Toward an integrative model of change' (1983) 51 *Journal of Consulting and Clinical Psychology* 390-395.

<sup>1257</sup> See generally, Wu, above n 471, 153. Wu is Associate Dean and Associate Professor, Faculty of Law, University of Hong Kong.

<sup>1258</sup> Wu, above n 471, 153 (citing to General Council of the Bar and the Council of the Law Society, London, *A Time for Change: Report of the Committee on the Future of the Legal Profession (the Marre Report)* (1988)).

resulted in fundamental changes to the curriculum by reducing lectures and increasing problem-based learning, integrating skills training in various legal and lawyering skills, use of training groups that encourage law students to work in teams, and teaching and assessment methods that are more skills-based rather than knowledge-based.<sup>1259</sup> In the case of Hong Kong's example, the government appears to have gone through a readiness assessment and clearly recognised a need for reform and moved through the stages of change to act on recommendations for reform as well as implement a maintenance plan to ensure that those changes are durable and measurable.

The second recommendation of a multi-level approach to implementing the policy reform proposals discussed in this chapter is to use the social marketing approach to target specific, measurable, small changes towards those who are ready for change. The social marketing approach is ideal for this particular issue because it allows for change to take place gradually and thus builds trust among all stakeholders to ensure that whatever change is implemented will be durable. This is especially important because the specific issues to be addressed in this thesis are complex, contentious, and require patient, reasonable, and measured response. Every stakeholder discussed in the aforementioned proposals is important to the overall success of an integrated, effective reform agenda. Law and the legal profession are perceived as notoriously blind to professional reform and radical change. The social marketing approach allows for flexibility and a variety of options in delivering the right message and encouraging the desired behaviours. It is also more conducive to

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<sup>1259</sup> Wu, above n 471.



personal responsibility approach rather than imposed governmental or professional mandates.

Finally, as Halpern et al have observed, the best, most effective and long-term way to help someone is to find a way where they can help themselves by recognising that ‘policy can have twin goals which operate together - policy must at once empower and give choices, but at the same time policy should set the default to be in the best interests of individuals and the wider public interest...[and] [t]o be effective, this twin approach needs to be built around a sense of partnership between state and individual.’<sup>1260</sup> I would further argue that this partnership needs to include the public as well as educational institutions to truly implement changes which will create positive public perceptions of the legal profession. More than ever, as highlighted by scholars such as Rhodes, Menkel-Meadow, Luban, Chart, Eyster and others, lawyers need to start playing an active part in professional reform and feel as if they are owners of the system they devote such an enormous part of their life to, both on a personal and professional level.

In conclusion, this section highlighted various theories of encouraging and implementing behavioural changes. While still considered a dominant approach to behaviour change, the rational choice model is no longer *the* most dominant or highly effective approach, especially in the area of complex behavioural change issues. In addition, this section discussed how some of the aforementioned theories can be used to address the issue of lawyer deception in negotiation.

The theories and approaches presented in this section suggest that there is hope in encouraging behavioural change and a variety of tools and techniques such

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<sup>1260</sup> David Halpern et al, above n 1222, 60-61.

that the profession should not be discouraged from attempting to implement the policy reform proposals discussed in this chapter. Instead, the profession should be encouraged to act where necessary to address behavioural changes using positive and effective methods. Law is generally considered a predominantly reactionary profession rooted in tools of rational analysis and punitive measures to diagnose, analyse, and control behaviour. However, with the introduction of ADR, law is slowly evolving and this means that change may be required to the ways and means used to practice law.

By implementing the policy reform proposals discussed in this chapter through the strategic use of established and successful theories and approaches, such as those discussed above, the profession stands to reap enormous benefits. The potential goals and benefits to be derived from implementing the proposed policy reforms are discussed in the next section.

## **7.7 IMPLEMENTING THE PROPOSED POLICY REFORM PROPOSALS**

Attempting to address the issue of a lawyer's use of potentially deceptive behaviour in negotiation has been the basis of significant scholarly debate since the early 1980s and continues to today. It remains a timely and unaddressed issue because it is complex, multi-disciplinary, and cross-jurisdictional. A single solution is likely not as effective as an integrated, multi-disciplinary approach to this issue.

The goal of any reform proposal should be to improve the lives of those who are recipients of or subject to the reform as well as to offer improved services to those who may be the intended beneficiaries of such reforms. The net result is increased quality in the performance and satisfaction of all key stakeholders, resulting in financial stability and professional viability. The importance of addressing this issue

and the potential benefits can be seen from the perspective of what Fleming, Coffman, and Harter call the ‘human sigma’. In the context of this thesis, the goal of implementing the policy reform proposals discussed in this chapter is to increase the ‘human sigma’ of the legal profession in a positive way.

In manufacturing, quality and value of a given business is generally managed and measured through methodologies such as Six Sigma principles. Six Sigma principles are quality improvement guidelines that are applied in the manufacturing sector to ensure that value is created in the factory floor.<sup>1261</sup> It works well in manufacturing because of predictable properties and variables. The profession of law is a service organisation where the product is more service-oriented in the form of intellectual legal advice, reasoned opinions, negotiated agreements, and court or legal documents.<sup>1262</sup> In a service organisation, the predictable properties are less and variability is potentially greater because of volatile human dimensions.<sup>1263</sup>

As discussed earlier, rational choice is not the only thing guiding human behaviour in the legal context.<sup>1264</sup> Other factors, such as external influences, environmental factors, peer pressure, and emotions can significantly affect certain decisions. In the profession of law, employees are the individual lawyers and the customer is the client (or plaintiff and defendant). It is in the interests of the employer (i.e., the legal profession in the form of law firms, non-profit organisations, corporations, etc) that both employees and clients are happy. Lawyers provide a

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<sup>1261</sup> John H Fleming, Curt Coffman, and James K Harter, ‘Managing Your Human Sigma’ (2005) *Harvard Business Review* 107, 108.

<sup>1262</sup> See, eg, Bok, above n 547, 1 (describing universities and law firms (and practice of law) as ‘intellectual institutions’ affected negatively by competition and stating “competition in intellectual pursuits is problematic in that it is often hard to measure the quality of the product.”). The purpose of this section is to address how the human sigma approach can be used to measure the quality of a service-oriented organisation such as law.

<sup>1263</sup> Fleming, Coffman, and Harter, above n 1261, 108.

<sup>1264</sup> Please see Chapter 2, section 2.37 for a more detailed discussion.

service to clients in the form of negotiations, legal advice and formal representation of the client's interests. Within such a service profession, there can be enormous variability in performance within each jurisdiction and within each local legal services provider, including those who offer ADR services. .

To address quality and value in a service organisation, Fleming, Coffman and Harter developed a quality improvement approach called human sigma, designed to reduce variability, improve performance, improve the quality of the customer-employee relationship and, thus, improve financial performance and satisfaction of both the client and the employee. This, in turn, creates greater stability, financial viability and positive perception of the employer (the institution or business). Human sigma argues that in a sales and service organisation, there are 'enormous variations in quality at the work-group and individual levels' in the employee-customer encounter.<sup>1265</sup> This creates local variability to the extent that it affects performance of the workgroup and the company as a whole.

For example, in the legal profession, a client may be very happy with the attorney-client relationship yet have a completely negative view of the legal profession as a whole.<sup>1266</sup> By reducing local variability and managing the quality of the employee-customer encounter at the foundational level through a consistent method of assessment and process management, the human sigma score of a company (i.e., a law firm or association) can improve and result in greater financial

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<sup>1265</sup> Fleming, Coffman, and Harter, above n 1261, 108. This can certainly be verified by the fact that while consumers may have a negative perception of the legal system as a whole, they generally have a positive perception of their own lawyer, owing greatly to the individual lawyer and the quality of the lawyer-client relationship based on loyalty and partisanship.

<sup>1266</sup> See, eg, *Public Perception of Lawyers: Consumer Research Findings*, above n 13 (confirming the public's general perceptions versus individual perceptions of individual attorney-client relationships).

improvement.<sup>1267</sup> An added benefit not fully discussed by the authors is the positive perception and views of the employer as a result of this quality improvement.

Fleming, Coffman and Harter assert that the quality of that employee-customer interaction can be improved through both ‘short-term transactional interventions (such as coaching) and long term, transformational ones (such as changing the processes for hiring and promotion)’. The core principles of human sigma can be applied to the issue of lawyers’ deceptive conduct in negotiations as explained below.

One could argue that while lawyers are part of a collective profession with a common goal and set of rules, law is also highly variable and lawyers may act differently based on their local jurisdiction. In the context of negotiation and without guidance from the profession through its legal ethics codes, lawyers may negotiate quite differently using different styles depending on their personal style or the community negotiation standards of their jurisdiction.<sup>1268</sup> In effect, this means that there is enormous local variability in how lawyers negotiate and whether they use deceptive behaviours in negotiations. This local variability may extend to each negotiation and to each lawyer-client relationship.

As discussed in Chapter 4, one jurisdiction, such as Alberta, Canada has strict, explicit rules on lawyers’ behaviour as negotiators. Another jurisdiction, such as Queensland Australia or Hong Kong may be completely silent on the issue while yet another, such as the United States, may appear to allow some forms of deception based on generally accepted negotiation conventions recognised in that jurisdiction

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<sup>1267</sup> Fleming, Coffman, and Harter, above n 1261, 108.

<sup>1268</sup> See eg Williams, above n 225 (finding different negotiation and lawyering styles in even a single jurisdiction).

without clearly defining those conventions.<sup>1269</sup> This is an example of how the differences in the legal ethics codes can perpetuate local variability on one simple issue, thus creating a ripple effect on legal practice.

Local variability is not necessarily undesirable; however, if the local variability impacts on performance, quality of the service, or perception of a professional or the company he/she is part of, then local variability may be considered undesirable or even detrimental to the organisation's success. While some might argue that a degree of local variability is normal and that the reputation effect or market economics will take care of these issues, the best way to consistently manage these types of cases before they create lasting damage is to be clear on the rules and processes which apply in that situation. Without measuring the effectiveness and satisfaction of the employer-employee-customer interaction from all sides, it is not appropriate to simply say there is no issue or that the issue does not require some degree of attention and resolution.

In this case, the situation is whether lawyers are allowed to use deceptive tactics or engage in allegedly deceptive behaviours in negotiations. By setting clear guidelines, creating consistency in the legal regulations, and creating the institutional environment that supports changed behaviours, local variability can be reduced and measured consistency can be increased across the local, national, and international legal work groups. The result is greater employee and customer satisfaction combined with stronger performance at the professional, personal, and financial levels for all key stakeholders.

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<sup>1269</sup> See generally Daigneault and Marshall, above n 1097, 18 (highlighting the precarious position of lawyers in the area of negotiations as well as the issues with Rule 4.1 of the *Model Rules of Professional Conduct* in the United States).

To date, Fleming, Coffman and Harter have successfully applied their human sigma methodology to the retail banking and call centre management areas which are heavy in human interaction and variability. Comparatively, given the extensive and sometimes intense nature of human interactions and volatility in the legal profession, human sigma principles can be used in the area of law and legal education. More importantly, the human sigma principles can be used in implementing and measuring the success of the proposed policy reform proposals recommended in this chapter.

## **7.8 CHAPTER CONCLUSION**

This chapter presented a tripartite set of policy reform proposals for addressing the issue of lawyers' use of potentially deceptive tactics in negotiation in an integrated and multi-disciplinary approach. The policy reform proposals were centred on targeting legal regulation, ethical standard setting and institutional design. Further to the policy reform proposals, a discussion and analysis of various behavioural change models affirms that there are a variety of effective ways to address this complex issue. Addressing this issue in a concrete and measurable way will go a long way towards reducing the local variability and confusion on appropriate standards of behaviour for lawyers in negotiation.

The potential benefits of implementing the policy reform proposals include decreased local variability resulting in better performance, increased consistency in the way lawyers practice as negotiators, clarity in the standards of negotiation behaviours, reduction in ethics violation cases, and greater positive public trust in and perception of lawyers and the legal profession. The next chapter provides a thesis summary and concludes with remarks on the impact of the findings and recommendations in this thesis to future research, practitioners, and theory.

## CHAPTER 8 – THESIS SUMMARY AND CONCLUSIONS

*‘In the last analysis, the law is what the lawyers are. And the law and the lawyers are what the law schools make them.’*

~ Felix Frankfurter<sup>1270</sup>

*‘And the day came when the risk to remain tight in a bud was more painful than the risk it took to blossom.’*

~ Anais Nin<sup>1271</sup>

The foregoing chapters outlined four primary research questions, discussed the results of an analysis into each research question, established a foundation for change, and presented a set of strategic, integrated policy reform proposals for the issues arising out of this research. This chapter begins with assessing the implications of this study on future research and practice. Next, the chapter discusses the relationship of the results to existing or future theory. Finally this chapter concludes with a call to action to implement the policy reform proposals outlined in Chapter 7 in order to address the issues discussed in this thesis.

### 8.1 INTRODUCTION

Chapters 3, 4 and 5 presented and discussed the results of analysing each of the three significant research questions outlined in Chapter 1. The research led to the conclusion that strategic policy reforms are essential to addressing the issue of a lawyer’s use of deception in negotiation. Chapter 7 outlined these recommended policy reforms using an integrated, tripartite approach.

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<sup>1270</sup> Felix Frankfurter, cited in Rand Jack and Dana Jack, *Moral Vision and Professional Decisions: The Changing Values of Women and Men Lawyers* (1989). See also Sisela Bok, ‘A Flawed System of Law Practice and Law Teaching’ (1983) 33 *Journal of Legal Education* 570, 583 (“...law schools train their students more for conflict than for the gentler arts of reconciliation and accommodation. This emphasis is likely to serve the profession poorly.”).

<sup>1271</sup> *Anais Nin Quotes*, above n 727. Anais Nin was an American author.



The first research question, discussed in Chapter 3, confirmed that lawyers tend to engage in deceptive and misleading conduct in practice, including during negotiations. Williams' long-range study combined with Lerman, Davis, and Wetlaufer's anecdotal studies in the United States and Australia identified ways in which legal practitioners tend to use deception in practice and ways in which lawyers attempt to justify such conduct.<sup>1272</sup> One of the key insights from these studies is that legal practitioners seem to believe that such conduct is either explicitly permissible under the legal ethics code of their jurisdiction or acceptable because the legal ethics code does not explicitly prohibit such conduct. The insights from the first research question established a sound basis for investigating the second research question.

The second research question, discussed in Chapter 4, focused on whether legal ethics codes regulate the issue of deception in negotiation. Chapter 4 contains the results of a study of the legal ethics codes of four common-law jurisdictions.<sup>1273</sup> The study revealed that legal ethics codes, which are meant to guide lawyer conduct and curtail deceptive or misleading conduct of legal practitioners, are broad, highly aspirational, and out-of- step with societal ethics,<sup>1274</sup> especially with regards to negotiation behaviour.

Historically, law and ethics (morality) have been separated in terms of law and legal education. However, there is an equally strong argument that law and ethics are interdependent such that they can coexist and are not mutually independent of each

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<sup>1272</sup> See Chapter 3 (Alleged Deceptive Behaviours of Lawyers) for more information.

<sup>1273</sup> See Chapter 4 (Efforts by Professional Ethics Codes to Regulate Deceptive Behaviours in Negotiation) for more information.

<sup>1274</sup> See Chapter 2, Section 2.3.2 (Theories of Ethics) for a discussion on ethics and dominant theories of ethics.

other.<sup>1275</sup> In some respects, the legal ethics codes represent the morality of the profession while statutes and regulations represent the law (rules) of the same profession. They are meant to work together.

With regards to the application of the legal ethics codes to guide professional conduct in negotiations, a review of legal ethics codes across four common law jurisdictions raises several questions: 1) whether negotiation need to be explicitly defined as a function of the legal professional; 2) whether the legal ethics codes need to have special rules for lawyer as negotiator which are different from traditional ‘rules’ of the bargaining process; 3) whether all legal ethics codes make exceptions for certain permissible deception in the context of negotiation consistent with generally acceptable negotiation standards; 4) whether legal ethics codes, cross-jurisdictionally, should be consistent with regards to deceptive or misleading conduct, especially in negotiations; and 5) whether legal ethics codes need to be amended to include gradations or categories of deceptive conduct with corresponding sanctions which are aligned to reflect prevailing legal precedent. These foundational questions were addressed and incorporated into the policy reform proposals discussed in Chapter 7 with the aim of improving the extent to which ethics can influence the behaviour of legal professionals on this issue.

The recognition that lawyers engage in deceptive tactics in negotiation and that the legal ethics codes fail to provide sufficient guidelines on appropriate negotiation behaviour led to the third research question, a study of ethics violation cases as discussed in Chapter 5.

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<sup>1275</sup> See, eg, Honoré, above n 115.

The third research question involved an analysis of whether the legal ethics codes are successful in curtailing deceptive behaviour in negotiation. Chapter 5 presented the results of a unique study of the ethics violation cases of one common-law jurisdiction, namely Queensland, Australia. This common law jurisdiction serves as a representative sample from the jurisdictions studied in Chapter 4. The results of this analysis confirmed earlier research on legal ethics discussed in Chapter 2<sup>1276</sup> and led to the conclusion that the legal ethics codes do not appear to be entirely successful in curtailing the deceptive conduct of legal professionals, whether in negotiation or otherwise. For example, the analysis of the ethics violations cases seem to confirm Schweitzer and Croson's findings that ethics education is not a sufficient deterrent and is a negligible factor in preventing deceptive behaviour in negotiation.<sup>1277</sup> This might be due to lack of resources, lack of adequate 'policing' of lawyers in a self-regulated profession, discretionary choices on which violations are egregious enough and deserve to be prosecuted, or some other factor.

The ethics violation cases also show that the profession will only vigorously pursue and prosecute the most egregious violators and that the number of prosecutions are small compared to the total number of lawyers in that jurisdiction.<sup>1278</sup> As such, these cases could be seen as 'token' prosecutions that serve as reminders of a 'public flogging' should lawyers violate the code of professional conduct and as examples to the public that the profession takes these violations seriously. Furthermore there is a

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<sup>1276</sup> See Chapter 2, Section 2.5.4 (Research About Legal Ethics) for more information.

<sup>1277</sup> See generally Schweitzer and Croson, above n 326, 225-228. The qualification is that ethics education in law school, as it is taught today, is not a sufficient deterrent. If this was amended, there may be a greater chance that ethics education in law school could help lawyers deal with ethical dilemmas in practice. See Chapter 7 (Implications for Law Reforms) for proposals related to this issue.

<sup>1278</sup> For example, the Queensland Law Society states that it has 6,000 members as at March 2008 yet the total number of ethics violation cases alleging deceptive or misleading conduct in a 10 year period between 1996 and 2006 is approximately 20. See Chapter 5 and Appendices for further details on this analysis.

lack of clear, consistent sets of decisions which would lead one to predict the analysis or outcome of future cases (apart from saying the legal professional will be struck off) because so much subjectivity seems to go into determining the severity of the conduct and subsequent punishment. In many of the cases, it can be inferred that each member of the tribunal that hears an ethics violation case has their own personal ethics, a societal ethic, or even their own lawyer ethic which influences their view of the attorney's alleged bad conduct and potentially clouds their final judgment. The lack of clear distinctions means that those hearing ethics violation cases have little concrete and consistent guidance on which to make sound judgment free of criticism or appeal, even with the benefits of prior case law decisions.<sup>1279</sup>

In summary, the foregoing chapters established a case for change in which the profession must firmly address the issue of lawyer deception in negotiation. One important way to do so is by implementing the policy reform proposals outlined in Chapter 7. These policy reform proposals, based on an integrated, tripartite response consisting of legal regulation, ethical standard setting and institutional design reforms, serve to address the issue of deception in negotiation. In addition, the policy reform proposals create a foundation for moving the profession forward to meet the challenges of serving a global legal services market. As such, this thesis has implications for further research, valuable practice recommendations for academia and legal practitioners, and provides a tool for policy makers to engage in effective policy reforms as discussed in this thesis. Each of these implications arising out of the contribution of this thesis is discussed below.

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<sup>1279</sup> See, eg, *Craig Stephen Bax* [1998] QCA 089 (recognising that there are gradations of deceptive conduct that would be considered egregious yet not having any impact on the punishment imposed on the practitioner charged with intent to deceive). This view of the lack of objectivity and consistency in ethics violation cases has been shared by many legal scholars.

## **8.2 IMPLICATIONS FOR FURTHER RESEARCH**

The findings of this study and the application of these findings to addressing the issue of deception as a legal negotiation strategy have highlighted some avenues for future research.

First, the profession and academia would benefit from extending the work of Lerman, Rivers, Lewicki, Wetlaufer, and Davis by developing an objective, systematic catalogue of the negotiation behaviours of lawyers. This taxonomy could then be used to conduct quantitative studies to determine the extent to which lawyers actually engage in the categories of behaviours defined by the taxonomy. The taxonomy could also be used cross-jurisdictionally to gain a better perspective on the global nature of this issue.<sup>1280</sup>

Second, the comparative legal ethics code study conducted in Chapter 4 combined with the research findings of Lamb, Manwaring and McFarlane, Moliterno, and Wilkinson et al can be leveraged to undertake further research on other common-law as well as civil-law jurisdictions to determine the extent to which legal ethics codes can serve as a valuable and practical tool for legal practitioners when addressing ethical dilemmas such as deception in negotiation. Policy makers can use the study in Chapter 4 to review the national legal ethics code and state-wide ethics codes for consistency and alignment with practical expectations of ethical conduct. Consistency is a hallmark of care and quality and this includes consistent language, interpretation, and application of the ethical codes of conduct.

In addition to implications for further research, the findings of this study have implications for practitioners.

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<sup>1280</sup> Note: The work of Professor Harry C Triandis is exemplary as a model of conducting cross-jurisdiction and cross-cultural studies.

### **8.3 IMPLICATIONS FOR PRACTICE**

The findings of this study suggest several implications for practice. First, legal practitioners and scholars need to look at the negotiation process in context. What I mean by this is that the term ‘negotiation’ is generally used as an all-encompassing term for a process that involves the exchange of goods and services, and in many cases of dispute resolution, the exchange of information. Context with regards to negotiation is equally important because the context can change the rules by which negotiation takes place. For example, negotiation in the business context (business negotiators) may be relatively simple as having a reservation price, making an offer, listening and responding to counter-offers, making appropriate concessions, and closing the deal. This process is well known and articulated. Little discussion of ethics takes place such that action precedes thought (i.e. generally action of a negotiation task precedes any thoughts of ethical implications).

In contrast, negotiation in the context of law (legal negotiation) may require more thought before action. In other words, I submit that legal negotiators need to put ethics at the forefront of negotiation and think more seriously about the ethical framework in which their negotiations take place to ensure that their actions (use of strategy and tactics) are aligned accordingly.

Second, practitioners need a more comprehensive and well-rounded education (discourse) on ethics, as discussed in Chapter 7, through implementation of the ethical standard setting reforms. This is especially important today where legal practice continues to evolve in a functional, structural, and operational manner. Nearly all law schools require law students to take an ethics course that instructs them on the prevailing ethics rules and case law. While legal ethics courses are helpful, the

findings of research into legal ethics as well as deception in negotiation demonstrates that a single required legal ethics code does not guarantee or have an impact on whether the individual will refrain from using deception in negotiation or engaging in other deceptive or misleading practices. As such, the current legal ethics courses, without more, may be insufficient in providing proper guidance on how lawyers should behave.

Third, policy makers should undertake a review of the national legal ethics code and state-wide ethics codes for consistency and alignment with practical expectations of ethical conduct. This might include providing greater clarity about the rules and guidelines which apply to the varied functions of a legal professional as well as incorporating more objective, specifically defined distinctions between professional misconduct, unprofessional conduct or malpractice with corresponding sanctions. Consistency in thought and application is one relatively simple way to weave a stronger ethical fabric upon which to base future conduct. By implementing the policy reform proposals centred on the integration of ethical standard setting, legal regulation, and institutional design aligned with core values,<sup>1281</sup> the profession can ensure consistency and improve performance. More importantly, the consistency created by implementing the policy reform proposals is likely to improve the perception of legal professionals currently held by the public as evidenced by the consumer studies discussed in Chapter 6.<sup>1282</sup>

In summary, this study provides many avenues of further development for practitioners and policy makers in understanding the nature and importance of

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<sup>1281</sup> See Chapter 7 (Implications for Law Reform) for more information on these policy reform proposals.

<sup>1282</sup> See Chapter 6, Section 6.5 (Consumer Studies of the Legal Profession are the ‘Sting in the Tail’) for more information.

negotiations, negotiation theory and principles, the ethics of negotiation and how practitioners can embody the best possible ethical principles in negotiation in line with their existing duties to the client, the justice system, and society as a whole.

#### **8.4 RELATIONSHIP OF RESULTS TO THEORY**

This thesis began with a journey to understanding whether and the extent to which lawyers use deceptive behaviour in negotiation and whether legal ethics codes, principally charged with regulating lawyer conduct and providing guidance to lawyers on acceptable and unacceptable professional conduct, are successful in curtailing such deceptive behaviours. This journey led to the conclusion that a strategic set of integrated policy reform proposals is necessary and beneficial to not only addressing the issues discussed in this thesis but to align with recent recommendations on the nature of professionalism and legal education as they pertain to the legal profession.<sup>1283</sup>

The findings and conclusions have implications to the prevailing theory of legal ethics, commonly called ‘adversarial ethics’ or ‘standard conception’. Deception in negotiation is common and expected, especially where the negotiator is using a distributive bargaining theory of negotiation; however, it is also common in interest-based and mixed-motive negotiations because they eventually contain some distributive items. The primary strategy for distributive bargaining is value-claiming, fixed-pie, win-lose mentality where the focus is simply on winning.<sup>1284</sup>

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<sup>1283</sup> See, eg, Gary Davis, *International Conference on the Future of Legal Education: Report to Council of Australian Law Deans (Summary)* (2008) 2-8  
<http://www.cald.asn.au/docs/FutureOfLegEdConfRptSummy.doc> at 26 February 2010.

<sup>1284</sup> See generally Lewicki, Sanders and Barry, above n 25; Karrass, above n 919; Williams, above n 202, Fisher, Ury and Patton, above n 536.



The legal system, or the adversarial system as many call it, is principally a system based on the same mentality – win-lose – or it has been for many years until recently with the incorporation of more ADR processes into the mainstream of the judicial system. The legal system is considered ‘adversarial’ because the trial mentality of win-lose, plaintiff-defendant, or prosecutor-defender, seems to turn every dispute into a contest of who will win and who will lose. It is also constantly portrayed as adversarial in the media, in popular culture, and in the law firm culture. Furthermore, the nature and purpose of the ‘adversarial’ aspect has been diluted and misunderstood in light of the historical context in which this was envisioned, as a means of uncovering the truth.<sup>1285</sup>

Because traditional bargaining is still a win-lose mentality and the legal system is a win-lose system, lawyers are likely to use deception in negotiations if they can get away with it. Further, the legal ethics codes across a majority of common-law jurisdictions, to date, provide little or no guidance on how lawyers should behave in negotiations. Therefore, lawyers might assume the ‘general negotiation conventions are acceptable’ posture due to silence regarding alternate acceptable behaviour.

Critics lament the current ‘standard conception’ model of legal ethics (adversarial ethics) as an excuse to continue with potentially unethical behaviour. As a reminder, the standard conception model consists of the principle of partisanship, the principle of neutrality, and principle of non-accountability (role morality).<sup>1286</sup> Critics argue that the combination of these three principles is the reason why lawyers

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<sup>1285</sup> Carvan, above n 2, 70.

<sup>1286</sup> See, eg, Tim Dare, *The Counsel of Rogues? A Defence of the Standard Conception of the Lawyer’s Role* (2009) 3-11 (discussing these three principles of the standard conception model and describing some of the main criticisms of this model of lawyer’s role); Luban, above n 1130, 139-178.

are seen as ‘amoral’, hold themselves not accountable for their actions in fighting for their client’s interests, and are alienated from ordinary morality.<sup>1287</sup>

However, the results of this study show that the views regarding the principles of the standard conception model are not as simple or conclusive as they would seem to the outsider or the public. First, there is a difference between being ‘amoral’ and ‘immoral’. Amoral means that while a person does believe in the existence of moral principles, the individual has a complete lack of belief in any sort of existing morality or ethical code.<sup>1288</sup> Immoralism, on the other hand, rejects moral standards and directly opposes morality.<sup>1289</sup>

On the basis of this study, it appears that most lawyers are neither ‘immoral’ nor ‘amoral’. They may have to abide by a role-morality but that is expected of any profession, especially the legal profession charged with the highest standards of upholding the availability of pursuing justice for all, not just for one person or for whom they personally find more favourable, rich, poor, or famous. Lawyers, even in their capacity as negotiators, have to be able to withhold their personal morals from infringing upon a potential client’s right to access justice and to make a choice in their defence.<sup>1290</sup> In this case, they may be regarded as adopting not a ‘role-morality’ but a ‘role-neutral morality’.

The results from this study seem to indicate that while critics say lawyers use the principle of nonaccountability (due to role-morality), this is likely not the case in a

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<sup>1287</sup> See, eg, Dare, above n 1286, 3 (describing some of the main criticism of the standard conception); Luban, above n 1130, 139-178.

<sup>1288</sup> Ayn Rand, *Philosophy: Who Needs It* (1984) 47-50; Anita Superson, *The Moral Skeptic* (2009) 127-159.

<sup>1289</sup> See, eg, Ronald D Milo, *Immorality* (1984).

<sup>1290</sup> Dare, above n 1286, 10-12 (discussing how the principle of non-accountability is often misunderstood and causes lawyers and others to incorrectly assume that the lawyer “identifies or sympathise[s] with their client’s goals... [whereas] the lawyer might have strong moral objections to a client’s projects, but be forbidden from relying upon those objections by the principle of neutrality...”).

majority of situations. The principle of nonaccountability argues that lawyers do not feel accountable for their actions. The results seem to indicate that it is *not* that lawyers feel they are not accountable because, clearly, they face ethical dilemmas often and can explain those dilemmas, including whether to be deceptive in negotiations.<sup>1291</sup> The results seem to indicate that when lawyers do face these ethical challenges, there are insufficient resources to help them deal with these ethical challenges such that they may appear unaccountable or be perceived as unaccountable. The studies indicate that there is a disconnect between their exposure to ethical dilemmas and the guidance available to them in order to effectively and consistently deal with those ethical issues in practice, with the legal ethics codes providing little direct and practical guidance.

This study challenges the way that the adversarial ethic or standard conception is viewed, taught, perpetuated, and perceived. This study implores and challenges practitioners and academia to find new ways to explore, discuss, and educate lawyers about the standard conception ethic, what it is meant to be, and to help future lawyers to understand their place in society – to understand that by adopting a role-morality, or rather *a role-neutral morality*, that is presumably higher than ordinary morality, a lawyer takes on ethical obligations which might require conduct in negotiations that is above generally accepted negotiation conventions. Such a critical discussion may serve as the basis of determining whether the standard conception is no longer applicable or whether, as Dare argues, the standard conception is merely suffering

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<sup>1291</sup> See Chapter 2, Section 2.5 (Synthesis of Literature Review) for more information on the research findings regarding the types of ethical dilemmas lawyers face in practice.

from a lack of poor perception and understanding.<sup>1292</sup> Without such a critical discourse, lawyers, in their increasingly important capacity as negotiators, might never reach resolution on how they are to act in negotiations and whether the use of deceptive conduct in negotiations will serve the public and the profession. On the other hand, by having such a discourse, lawyers can help their clients, colleagues, academia, and those who come in contact with the legal system to also live by the standards conducive to a well-ordered society.

## **8.5 THESIS SUMMARY AND CONCLUSION**

Negotiation skills are an ever-increasing and critical component of a lawyer's practice. Negotiation is also the foundation of other dispute resolution processes, such as settlement conferences, mediation, and arbitration. Because lawyers negotiate so often, how they negotiate with clients and colleagues alike is just as important as what they accomplish during those negotiations. How a lawyer negotiates is directly tied to negotiation behaviour as reflected by the strategies and tactics employed in the negotiation. Positive and negative behaviours may create perceptions in the minds of clients and colleagues about the nature of the legal practitioner as well as the legal profession. As seen by the studies discussed in Chapter 6, these perceptions, to date, have been negative as compared with the perception consumers have of similar professions, especially with respect to the perception of lawyers as ethical and honest.

Prevailing conventions in negotiation theory and principles suggest that deception is an inherent part of the bargaining process. When applied to legal

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<sup>1292</sup> Dare, above n 1286, 10-12 (discussing how “a good deal of the widespread public dissatisfaction with the ethical standards of the law profession flow precisely from the tendency of observers to do what the principle [of nonaccountability] says they should not do – assume that lawyers endorse or sympathise with their client's causes.”). Note: Luban, a foremost critic of the standard conception, as well as other ‘observers’ generally only refers to the principle of partisanship and the principle of nonaccountability.

negotiations, these conventions tend to conflict with the lawyer's ethical duties to the courts, fellow practitioners, clients, and the public.

This study was an attempt to question the validity of prevailing notions of deception in negotiation and to investigate the extent to which lawyers use deception in negotiation, how ethics codes attempt to regulate such conduct, and whether such attempts are or can be successful. In addressing the research questions, this study used a primarily qualitative methodology with a cross-jurisdictional and multidisciplinary approach that involved a triangulation of theories, methods, and data. The study consisted of a catalogue of negotiation behaviours, an original cross-jurisdictional comparative analysis of legal ethics codes, and an original comparative analysis of the ethics violation cases of a sample common-law jurisdiction.

As a result of the findings and insights obtained through addressing the research questions, this study recommends implementing a set of integrated policy reforms in the areas of legal regulation, ethical standard setting and institutional design. The legal regulation reform proposals are targeted towards creating greater consistency in the legal ethics codes and behavioural norms on the ethics of legal negotiation. The ethical standard setting reforms are designed to establish core values that align the profession and improve the ethical decision-making skills of current and future lawyers consistent with the legal regulation reforms. The institutional design reforms are aimed at improving the enforcement of ethics violations that might involve deceptive or misleading conduct in negotiations as well as encouraging greater collaboration between the legal education institutions and the profession so as to align future legal education with what lawyers of the 21<sup>st</sup> century actually do in practice.

The goal of this integrated approach is to make an incremental yet measurable difference in the way lawyers do what they do most often – negotiate. By creating an incremental, positive change in behaviour, local variability in negotiation practice (e.g. use of deception in negotiation) is decreased, resulting in better personal, professional, and financial performance. In addition, such reforms are likely to result in greater consistency of expected negotiation behaviour that translates into increased performance and positive perceptions of legal practitioners. Finally, this research and subsequent findings provide a rich and substantial basis for future application in practice, application to theory, and further research.

In light of evolutionary factors such as increased globalisation and democratisation of countries, the continuing use and necessity of negotiation as a critical dispute resolution process, and the increased deployment of mandatory negotiation-based processes such as mediation, judicial settlement conferences, and arbitration, the time to act is now.

As expressed at the beginning of this chapter, the risk in remaining silent, in the corner, or on the fence is far greater than the risk to simply take one step towards integrated policy reform.<sup>1293</sup>

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<sup>1293</sup> Note: This statement is paraphrased from the quote by Anais Nin, above n 727: “And the day came when the risk to remain tight in a bud was more painful than the risk it took to blossom.”

## **APPENDICES**

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## **Appendix 2**

### **Queensland Ethics Violations Cases (1996 - 2007) Summary Analysis**

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## Appendix 2

### Queensland Ethics Violations Cases (1996 - 2007) Summary Analysis

**Note:** The following is a summary analysis of the Queensland ethics violation cases alleging deceptive conduct  
For confidentiality reasons, names of practitioners and/or any identifying information has been omitted. Example in Thesis: 1-S = Case 1 re Solicitor)

No	Year	Alleged Violation	Context/ Function	Aggravating (A) / Mitigating (M) Circumstances?	Hearing/Tribunal	Appeal
1	1996/1997 (solicitor) <i>Mead</i>	18 charges - Trust Accounts Act, failure to protect client interests among others;  NO allegations of fraud or deceptive behaviours	during course of practice	A - yes  M - yes	<b>Sept 1996</b> --guilty of professional misconduct; --suspended till July 1999 (approx 3 yrs); --pay costs	<b>April 1997</b> --guilty of professional misconduct; --suspension order set aside; --solicitor struck off; --pay costs
2	1997 (solicitor) <i>Smith</i>	fraudulently convert trust moneys	during course of practice	A - yes  M - yes (personal and medical)	<b>April 1997</b> --guilty of professional misconduct; --suspended till able to satisfy fit and proper criteria --pay costs	<b>April 1997</b> --guilty of professional misconduct; --suspension order set aside; --solicitor struck off; --pay costs
3	1997/1998 (solicitor/ partner for past 5 yrs) <i>Bax</i>	falsely backdating document with intent to mislead	during course of practice - acting for client in mortgage transaction	A - yes  M - none cited	<b>July 1997</b> --guilty of professional misconduct; --ordered to pay \$15,000 fine	<b>May 1998</b> --guilty of professional misconduct; --order for fine set aside; --solicitor struck off; --pay costs - fixed
4	1998 (solicitor) <i>Williams</i>	10 charges - 3 of them for fraudulent misappropriation of funds resulting in false and misleading statement of accounts	during course of practice	A - yes  M - yes	<b>July 1997</b> --guilty of professional misconduct; --solicitor struck off	<b>none found</b>

No	Year	Alleged Violation	Context/ Function	Aggravating (A) / Mitigating (M) Circumstances?	Hearing/Tribunal	Appeal
5	1998 (solicitor) <i>Gregory</i>	attempt to suborn Crown witness/induce to perjure	during course of practice	A - none cited  M - yes	<b>May 1998</b> --guilty of professional misconduct; --suspended from practice for 2 years	<b>December 1998</b> --guilty of professional misconduct; --suspension order set aside; --solicitor struck off; --pay costs - fixed; -- <b>Nov 2001</b> - application for re-admission denied
6	1997/2000 (solicitor) <i>Clough</i>	use of dishonest means to further a client's case (personal injury case)	during course of practice	A - none cited  M - yes (including need for intent + no finding of 'dishonesty' - just unfair means)	<b>Nov 1997</b> --guilty of unprofessional conduct; --suspended for 12 months; --ordered to attend legal education program; (NB - practitioner appealed)	<b>July 2000</b> --guilty of unprofessional conduct; --appeal and cross-appeal dismissed; --Tribunal's judgment affirmed (i.e. suspension) --pay costs
7	2000 (barrister) <i>Darveniza</i>	supplying dangerous drug (prior conviction); then intent to deceive court re his application/affidavit for barrister in NSW	court - application for barrister	A - yes (including personal conduct affecting professional standing)  M - none cited	<b>not found</b> --direct application to Supreme Court	<b>2000</b> --guilty of professional misconduct; --barrister struck off
8	2000 (solicitor) <i>Delaney</i>	3 charges of unprofessional conduct; no charges of deception or fraud alleged or found	during course of practice	A - yes (minor)  M - yes	<b>2000</b> --guilty of 'unprofessional conduct'; --fine of \$15,000; --pay costs + taxes; --pay compensation to 3 complainants totaling \$21,000	<b>2000</b> --affirmed Tribunal's judgment; --appeal by A-G dismissed

No	Year	Alleged Violation	Context/ Function	Aggravating (A) / Mitigating (M) Circumstances?	Hearing/Tribunal	Appeal
9	1999/2001 (solicitor) <i>Wright</i>	8 charges - false or misleading affidavits; false or misleading or recklessly made statements and submissions to QLS re commercial transaction case	in court + during course of practice	A - yes  M - none cited	<b>Dec 1999</b> --guilty of 'professional misconduct'; --solicitor struck off --pay costs + taxes;	<b>Feb 2001</b> --affirmed Tribunal's judgment; --appeal by practitioner dismissed; --pay costs of appeal
10	2001 (barrister) <i>Khan</i>	failure to disclose info relevant to application for admission (ie lack of candour in application)	during course of practice	A - yes  M - none cited	<b>not found</b> --direct application to Supreme Court	<b>March 2001</b> --guilty of professional misconduct; --barrister struck off
11	2001/2002 (solicitor) <i>Priddle</i>	2 charges of unprofessional conduct - failure to keep accounting and record of trust moneys; no charges of deception or fraud indicated; no findings of deceitful or dishonest conduct by court	during course of practice	A - none cited  M - yes	<b>Oct 2001</b> --guilty of 'unprofessional conduct'; --solicitor suspended for 1 year --pay costs	<b>Aug 2002</b> --affirmed Tribunal's judgment; --appeal by QLS and A-G dismissed; --costs to be assessed
12	2000/2001 (barrister) <i>Young</i>	1 charge - giving false evidence on commission inquiry into electoral fraud	at commission hearing	A - yes  M - yes	<b>not found</b> --direct application to Supreme Court	<b>March 2001</b> --guilty of professional misconduct; --barrister struck off; --pay costs
13	2003 (solicitor) <i>Whitman</i>	3 charges - 1 fraudulently misappropriate client funds; knowingly falsely represent employment of one solicitor	during course of practice	A - yes  M - yes	<b>Dec 2002/Feb 2003</b> --guilty of professional misconduct; --suspended for 9 months; --pay costs	<b>October 2003</b> --affirmed Tribunal's judgment; --appeal and cross-appeal dismissed
14	2002/2003 (solicitor) <i>Lowes</i>	7-8 charges of misappropriation of client trust funds + undue delay in administration of estate; no <i>charge</i> of dishonesty (but tribunal <i>finding</i> of dishonesty on 1 charge)	during course of practice	A - none cited  M - yes	<b>June/Aug 2002</b> --guilty of unprofessional conduct; --fine of \$15,000; --orders for CPM course + audit by senior practitioner; --pay costs	<b>October 2003</b> --affirmed Tribunal's judgment; --appeal via AG/QLS dismissed

No	Year	Alleged Violation	Context/ Function	Aggravating (A) / Mitigating (M) Circumstances?	Hearing/Tribunal	Appeal
15	2004 (solicitor) <i>Tunn</i>	4 charges - breaches of request for info via Society, failure to properly supervise staff, serious neglect and undue delay in handling cases; no deception or fraud alleged	during course of practice	A - yes  M - yes (personal and medical)	<b>June/July 2004</b> --2 charges guilty of unprofessional conduct; --2 charges guilty of professional misconduct; --solicitor struck off; --orders to pay compensation to named complainants for total of \$19,318.00; --pay costs; --no new undertakings by clients	<b>Nov 2004</b> --affirmed Tribunal's judgment; --appeal via solicitor
16	2005 (solicitor) <i>Williams</i>	various breaches of Trust Accounts Act and Trust Accounts Regulation; no deception or fraud alleged - none found	during course of practice	A - yes  M - yes	<b>June/July 2004</b> --guilty of unprofessional conduct; --solicitor suspended for 12 months (if default on any terms of order); --penalty of \$10,000 to Fund; --complete PMC module on Trust Accounts; --install/operate computerised Trust Account System; --pay costs  Note - Solicitor appealed for 'manifestly excessive penalty'	<b>Nov 2004</b> --affirmed Tribunal's judgment except varied suspension period to 6 months;
17	2005 (barrister) <i>Williams</i>	aggravated fraud; attempted aggravated fraud - personal actions affecting professional standing	during course of being barrister but not in course of practice; personal commercial transactions	A - yes  M - yes	<b>Oct 2005</b> --guilty of professional misconduct; --pay costs	<b>none found</b>

No	Year	Alleged Violation	Context/ Function	Aggravating (A) / Mitigating (M) Circumstances?	Hearing/Tribunal	Appeal
18	2005 (solicitor) <i>Baker</i>	18 charges of dishonesty in charging fees and rendering account of fees charged in violation of retainer agreement	during course of practice	A - yes (# of charges)  M - none cited	<b>Sept 2005</b> --guilty of 5 charges of professional misconduct; --guilty of 3 charges of unprofessional conduct; --solicitor struck off; --pay costs;  NB - Tribunal granted stay of strike off pending appeal	<b>Dec 2005</b> --Set aside Tribunal's order to stay recommendation as improper exercise of discretionary power; --solicitor struck off; --solicitor's application for stay dismissed; --no order as to costs
19	2006 (barrister) <i>Mullins</i>	knowingly misled insurer in connection with claims negotiation at mediation; fraudulent deception	during course of practice - at mediation	A - yes  M - yes	<b>Nov 2006</b> --guilty of professional misconduct; --publicly reprimanded; --pay penalty of \$20,000; --pay costs	<b>none found</b>
20	2006 (barrister) <i>Hackett</i>	swore misleading affidavit used in District Court	during course of practice - at meeting of body corporate	A - yes  M - yes	<b>Dec 2006</b> --guilty professional misconduct; --pay pecuniary penalty of \$5,000 --pay costs;	<b>none found</b>